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No.

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1989

SAM A FIORELLA
AND
SHADES RIDGE HOLDING COMPANY, INC.,
*Petitioners,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTION PRESENTED

In circumstances where a judgment has become unenforceable under state law by reason of lapse of time whether a lien under 26 U.S.C. § 6321, for the same liability as the unenforceable judgment, also becomes unenforceable.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Alabama, CV-86-PT-14155-S and CV-85-PT-2526-S (consolidated) has not been officially reported but is set forth in the record and appendix. (Findings of Fact and Conclusion of Law (R.2-61-1)) (Final Judgment and Decree of Foreclosure (R.2-62-1)) (Order denying Motion to Alter or Amend (R.2-66-1)).

The opinion for the United States Court of Appeals for the Eleventh Circuit is reported at 880 F.2d 342 (11th Cir. 1989) and was amended and superseded by the opinion upon denial of the Petition for Rehearing at 888 F.2d 725 (11th Cir. 1989).

## JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on August 10, 1989. A Petition for Rehearing was timely filed and the order of the United States Court of Appeals for the Eleventh Circuit amending the opinion entered on August 10, 1989 and denying the petition was entered on September 29, 1989. The jurisdiction of this Court is invoked under 29 U.S.C. § 1254(1).

## STATUTES AND RULES OF COURT INVOLVED

A) The statute creating the lien which the United States seeks to enforce in this action is 26 U.S.C. § 6321 which provides as follows:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property whether real or personal, belonging to such person.

B) The statute governing the duration of the lien for taxes is 26 U.S.C. § 6322 which provides as follows:

> Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

C) The statute governing the enforceability of judgments rendered by United States District Courts is 28 U.S.C. § 1962 which provides in pertinent part as follows:

> Every judgment rendered by a District Court shall be a lien on the property located in such state in the same manner, to the same extent and under the same conditions as a judgment of a Court of general jurisdiction in such state, and shall cease to be a lien in the same manner and time.

D) The Alabama statute governing the enforceability of judgments after twenty years is *Code of Alabama* § 6-9-190 (1975) which provides:

> A judgment cannot be revived after the lapse of twenty years from its entry.

E) The Rule of the Federal Rules of Civil Procedure governing the collection of judgments is Rule 69, which provides in pertinent part:

> The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the District Court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent it is applicable.

## STATEMENT OF THE CASE

The United States is seeking in this action to recover taxes and penalties of Sam A. Fiorella (Fiorella) totalling approximately $1,600,000.00 from three (3) parcels of real property titled in Shades Ridge Holding Company Inc. (Shades Ridge) a corporation whose stock is owned by the daughters of Fiorella,

(R.2-S-9,6,7)[1]. The $1,600,000.00 is comprised of a consolidated judgment against Fiorella entered in *United States v. Fiorella*, CV-64-391 and CV-65-774 (N.D. Ala. 1968) on January 3, 1968 totalling approximately $1,000,000.00 and an interlocutory judgment against Fiorella entered in the instant case on January 7, 1987 in the approximate amount of $590,000.00 representing deficiencies in Fiorella's income taxes and penalties for tax years 1969 through 1976. *Id.*

The government sought in this action to impose Fiorella's tax liability upon Shades Ridge based upon the theories that Shades Ridge is or was the alter ego or nominee of Fiorella and/or that the real estate owned by Shades Ridge or funds to purchase the real estate were fraudulently conveyed to Shades Ridge by Fiorella. (R.2.-60-2). The gravaman of both theories is that Fiorella fraudulently hid his assets in Shades Ridge to evade the satisfaction of his tax liability.

The United States District Court for the Northern District of Alabama entered Findings of Fact and Conclusions of Law in this case on December 17, 1987 and a Final Judgment and Decree of Foreclosure on December 29, 1987. (R.2-61-1 and 2-61-1). The District Court ruled that Shades Ridge was the alter ego of Fiorella and/or that the real estate or funds therefore had been fraudulently conveyed to Shades Ridge by Fiorella and that, therefore, the government could foreclose upon the assets of Shades Ridge to satisfy the 1968 judg-

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[1]The three (3) parcels of property from which the government seeks to collect the aforesaid judgment which are titled in Shades Ridge have been referred to throughout this litigation as the "Kid-McCoy property", the "highway 150 property" and the "Anniston property". The Kid-McCoy property was transferred to Shades Ridge by Fiorella when the corporation was formed by Fiorella's wife in 1957. (R.6-9) (R.7-93, 94, 95). Shades Ridge purchased the Highway 150 property on July 28, 1968, for approximately $35,000.00 and purchased the Anniston property on July 2, 1971 by paying a down payment of $5,000.00 and assuming a mortgage. (R.2-47.4) (R.9-13, 14) (R.2-60-43).

ment against Fiorella and the judgment entered herein January 1987. *Id.*

During the pendency of this case another District Court ruled that as a consequence of Alabama state law the 1968 judgment in the approximate amount of $1,000,000.00 which the government sought to collect in this action was no longer enforceable because of lapse of time. *United States v. Fiorella*, CV-64-391 (N.D. Ala. 1988). This decision was affirmed by another panel of the United States Court of Appeals for the Eleventh Circuit. *United States v. Fiorella*, 869 F.2d 1425 (11th Cir. 1989).

Based upon the aforesaid decision the petitioners filed a "Motion for Relief from Judgment or in the Alternative to Alter or Amend the Judgment" seeking to amend the judgment which had been entered by the Court in the instant case on December 29, 1987. (R.2-63-1). The petitioners sought in this motion for the District Court to conform its judgment in this case to the decision of the District Court (which was affirmed by the Court of Appeals in *Fiorella v. United States*) wherein the Court had ruled that the 1968 judgment totalling approximately $1,000,000.00 was no longer enforceable and requested that the Court rule that, as a consequence thereof, the United States could not now recover the $1,000.000.00 and that it could only recover the judgment for approximately $590,000.00 entered in this action on January 7, 1987. *Id.* The District Court entered an order on January 22, 1988 denying the petitioners' motion. (R.2-66.1).

On February 4, 1988, Fiorella and Shades Ridge jointly filed a Notice of Appeal appealing, among other things, the Court's order of December 29, 1987 denying the petitioners' Motion for Relief from Judgment or in the Alternative to Alter or Amend. (R.2-73-1). Petitioners' asserted that both the 1968 judgment in the amount of $1,000,000.00 and the tax lien for said liability which arose by 26 U.S.C. § 6321 had become unenforceable by reason of lapse of time.

In its original opinion upon this appeal, the United States Court of Appeals for the Eleventh Circuit made only the following reference to this issue:

> The last issue addressed by the parties concerns whether the District Court erred in denying Fiorella's Motion for Relief From Judgment or in the Alternative to Alter or Amend the Judgment on the ground that the January 3, 1968 judgment was not enforceable after January 3, 1988 as a matter of state law. Another panel of this Court affirmed the District Court in *United States v. Fiorella*, 869, F.2d 1425 (11th Cir. 1989). *Shades Ridge v. United States*, 880 F.2d 342 (11th Cir. 1989).

Petitioners filed a Petition for Rehearing with respect to this issue on August 24, 1989. The Court of Appeals denied the Petition for Rehearing but upon consideration thereof amended the Court's earlier opinion to add the following:

> That prior panel did not reach the question of whether the tax lien underlying the January 3, 1968 judgment remains enforceable as that issue was not before it. The District Court did not err in denying Fiorella's motion. When an unpaid assessment is reduced to judgment, the tax lien is incorporated, but not merged, in the judgment. Since the tax lien survives the judgment, it can be enforced at any time. (Citations omitted). *Shades Ridge Holding Co., Inc. vs. United States* 888 F.2d 725 (11th Cir. 1989).

Consequently the United States Court of Appeals held that even though the 1968 judgment was no longer enforceable because of lapse of time, the tax lien for the underlying liability was still enforceable.

Therefore, the Court of Appeals affirmed the District Court and held that Fiorella's liability of $1,000,000.00 which was

the subject of the 1968 judgment continued to be enforceable as a consequence of the tax lien created by 26 U.S.C. § 6321. Petitioners seek this Court's review of the holding of the Court of Appeals in *Shades Ridge vs. United States*, 880 F.2d 342 amended, *Reh. Den.* 888 F.2d 735 (11th Cir. 1989).

## REASONS FOR GRANTING THE WRIT

Of the sums which the government seeks to collect in this case $1,000,000.00 arises from a judgment for taxes entered on January 3, 1968 in the consolidated cases in *United States v. Fiorella*, CV-64-391, CV--65-774 (1968) (R.2-47-2). The government seeks to collect the judgment more than twenty years after its entry. Petitioners submit that both the judgment and the tax lien based upon this liability have become unenforceable by reason of lapse of time.

Alabama law controls the determination of the collectability of judgments entered in the United States District Court. Rule 69, *Fed. R. Civ. Proc.;* 28 U.S.C. § 1962. The applicable Alabama statute, *Alabama Code* § 6-9-190 (1975), provides that "[a] judgment cannot be revived after the lapse of twenty years from its entry." Based upon this statute it is well established in Alabama that a conclusive presumption of payment or satisfaction arises twenty (20) years after entry of judgment. *Henry v. State ex rel. Rainbow*, 16 Ala. App. 670, 81 So. 190 (1919). The aforesaid rule of law is not a statute of limitations but is a "rule of extinguishment". See *United States v. Tacoma Gravel and Supply Co.*, 376 F.2d 343 (9th Cir. 1967). "It goes directly to the obligation [of the judgment] itself and destroys it." *Id* at 345. It is well established by this Court that state statutory provisions like the Alabama statute set forth above are applicable to judgments entered in favor of the United States as well as to judgments in favor of private creditors. *Custer v. McCutchen*, 283 U.S. 514, 51 S.Ct. 530,

75 L.Ed. 239 (1939); *United States v. Kellum*, 523 F.2d 1294 (5th Cir. 1975). Consequently based upon Alabama law, as twenty years have lapsed since the date of the entry of the judgment for taxes which the government seeks to enforce in this action, the judgment has become unenforceable because of lapse of time. The government's twenty year old judgment "is not merely dormant, it is dead." *United States v. Tacoma Gravel and Supply*, 376 F.2d 343, 345 (9th Cir. 1967).

Based upon the aforesaid well established principles of law the United States District Court in *United States v. Fiorella* CV-64-391 ruled that because twenty years have lapsed since the entry of the 1968 judgment for $1,000,000.00, the judgment was no longer collectable and was by Alabama law conclusively presumed satisfied. *United States v. Fiorella*, 869 F.2d 1425 (11th Cir. 1989). The United States appealed this decision and it was affirmed by the United States Court of Appeals for the Eleventh Circuit. *Id.*

Upon the appeal in the instant case, the Court of Appeals for the Eleventh Circuit acknowledged that the twenty-year-old judgment was no longer enforceable because of lapse of time, but held that, without regard to the enforceability of the 1968 judgment, by 26 U.S.C. § 6321 the government has an enforceable tax lien which continues to exist in the same amount as the judgment. *Shades Ridge Holding Co., Inc. vs. United States* 888 F.2d 725, (11th Cir. 1989) (On Petition for Rehearing).

The lien asserted by the government which the Court ruled continued to be enforceable, arose by statute from the alleged failure or refusal to pay the taxes owed by Fiorella which were the subject of the 1968 judgment. 26 U.S.C. § 6321. The lien arose from the same tax liability upon which the judgment was based. The lien is based upon 26 U.S.C. § 6321 which provides in pertinent part, "[i]f any person liable lto pay any tax neglects or refuses to pay the same after demand,

the amount . . . shall be a lien in favor of the United States upon all property and rights to property . . . belonging to such person." The length of the duration or the life of the lien arising in the aforesaid manner is also governed by statute. 26 U.S.C. § 6322. The provisions of 26 U.S.C. § 6322 provide in pertinent part that "[u]nless another date is specifically fixed by law, the lien imposed by § 6321 shall arise at the time the assessment is made and *shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.*" (Emphasis Added)

It is clear that the tax lien which the Court held continues to be enforceable in the instant case arose from and represents the same liability as the 1968 judgment which has become unenforceable by reason of lapse of time. In other words, the 1968 judgment clearly arose out of the same liability as the lien the government seeks to enforce. The Court of Appeals properly held in *United States v. Fiorella* that the 1968 judgment had by Alabama law become unenforceable by reason of lapse of time. *United States v. Fiorella*, 869 F.2d 1425 (11th Cir. 1989). Consequently as the judgment against the taxpayer arising out of the same liability as the lien which the government seeks to enforce has become unenforceable by reason of lapse of time, it seems clear by the plain and unambiguous terms of 26 U.S.C. § 6322 that the lien which is the subject of this action no longer continues to exist and is therefore no longer enforceable. The Court of Appeals for the Eleventh Circuit, however, totally disregarded the clear provisions of this federal statute and ruled that the lien continues to be enforceable. *Shades Ridge Holding Co., Inc. v. United States*, 888 F.3d 735 (11th Cir. 1989).

The United States Court of Appeals for the Eleventh Circuit has therefore incorrectly decided an important and unsettled question of federal law which has not been, but should be, set-

tled by this Court. Petitioner submits that this issue was not ambiguous when viewed in light of the plain meaning of the relevant statutes. The opinion of the Eleventh Circuit *on rehearing* has now unsettled the matter and created an issue of first impression with far-reaching implications. This issue has not previously been addressed in any reported decision, other than the instant case, which petitioner has been able to find. The few cases which have tangentially touched upon this issue have held that the tax lien created by 26 U.S.C. § 6321 does continue to exist separate and apart from a judgment even when the same liability forms the basis for the lien and the judgment. *United States v. Overman*, 424 F.2d 1142 (9th Cir. 1970); *United States v. Hodes*, 355 F.2d 746 (2nd Cir. 1977), cert. dismissed 386 U.S. 901, 87 S.Ct. 784, 17 L.Ed.2d 779 (1967). These decisions *do not* extend the life of the lien beyond that of the judgment. *Id.* The purpose of these holdings is simply to provide the government alternative means of collection. See H.R. Rep. No. 1884, 89th Cong. 2d Sess, 31 (1962-2 Cum. Bull. 836). It does not follow from the fact that the judgment and the lien co-exist in order to provide alternative means of collection, that the lien remains enforceable after a judgment for the same liability has become unenforceble. If the decision of the Court of Appeals is affirmed, then a logical result would be that the satisfaction of a judgment will not cause a tax lien that arose from the same liability as the judgment to be extinguished. Such a result is absurd. To the contrary, the provisions of 26 U.S.C. § 6322 provide that when a judgment becomes satisfied or unenforceable, a lien based upon the same liability no longer continues to exist. No opinions have been found (the present case excepted), which address the effect of a judgment having become unenforceable by reason of lapse of time upon a lien which arose from the same liability as the judgment. Petitioners respectfully submit that this Court must resolve this issue to prevent

the chaos in the tax collection system that may arise from the decision of the Court of Appeals for the Eleventh Circuit.

Petitioners submit that the impact of the determination of this issue is of obvious and considerable importance in that it conceivably could effect the collectability of vast sums of taxes claimed by the United States and effect substantial property rights; therefore it involves an important question of the interpretation of a federal statute which should be settled by this Court.

## CONCLUSION

Petitioners submit that the issue posed above involves a question of exceptional importance concerning federal law and that this question has not been, but should be, resolved by this Court.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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**SHADES RIDGE HOLDING COMPANY, INC., Plaintiff-Appellant,**

**v.**

**UNITED STATES of America, Defendant-Appellee.**

**UNITED STATES OF AMERICA, Plaintiff-Appellee,**

**v.**

**Sam A. FIORELLA and Shades Ridge Holding Company, Inc., Defendants-Appellants.**

**No. 88-7085.**

United States Court of Appeals,
Eleventh Circuit.

Sept. 29, 1989

* * * * *

Appeal from the United States District Court of the Northern District of Alabama.

Before RONEY, Chief Judge, and COX, Circuit Judge, and MORGAN, Senior Circuit Judge.

ON PETITION FOR REHEARING

(Opinion August 10, 1989, 11th Cir., 880 F.2d 342).

PER CURIAM:

Upon consideration of appellants' petition for rehe[illegible], the opinion of this Court is amended to read as follow:

> The last issue addressed by the parties concerns whether the district court erred in denying Fiorella's Motion for Relief From Judgment or in the Alternative to Alter or Amend the Judgment on the ground that the January 3, 1968 judgment was not enforceable after January 3, 1988, as a matter of state law. Another panel of this Court affirmed the district court's holding that it would be a violation of state law to revive the 1968 judgment beyond January 3, 1988. *United States v. Fiorella*, 869 F.2d 1425 (11th Cir.1989).
>
> That prior panel did not reach the question of whether the tax lien underlying the January 3, 1968 judgment remains enforceable, as that issue was not properly before it. The district court did not err in denying Fiorella's motion. When an unpaid assessment is reduced to judgment, the tax lien is incorporated, but not merged, in the judgment. Since the tax lien survives the judgment, it can be enforced at any time. *See United States v. Overman*, 424 F.2d 1142, 1147 (9th Cir.1970); *United States v. Hodes*, 355 F.2d 746 (2d Cir.1966), *cert. dismissed*, 386 U.S. 901, 87 S.Ct. 784, 17 L.Ed.2d 779 (1967).
>
> The petition for rehearing filed by appellants Sam A. Fiorella and Shades Ridge Holding Company, Inc., is DENIED.

**SHADES RIDGE HOLDING COMPANY, INC., Plaintiff-Appellant,**

**v.**

**UNITED STATES of America, Defendant-Appellee.**

**UNITED STATES OF AMERICA, Plaintiff-Appellee,**

**v.**

**Sam A. FIORELLA and Shades Ridge Holding Company, Inc., Defendants-Appellants.**

**No. 88-7085.**

United States Court of Appeals, Eleventh Circuit.

Aug. 10, 1989

* * * * *

Appeal from the United States District Court for the Northern District of Alabama.

Before RONEY, Chief Judge, COX, Circuit Judge, and MORGAN, Senior Circuit Judge.

This appeal arises from two consolidated cases: a quiet title action commenced by Shades Ridge Holding Company, Inc. (Shades Ridge) and a foreclosure action by the Government to forclose tax liens and judgment liens relating to the tax liability of Sam Fiorella against property titled to Shades Ridge. The district court entered a decree of foreclosure against three parcels of real property, holding that Shades

Ridge was the alter ego and fraudulent transferee of Sam Fiorella. The total amount foreclosed was approximately $1,600,000, comprised of a consolidated judgment against Fiorella in *United States v. Fiorella*, Nos. CV-64-391 and CV-65-7745 (N.D.Ala.1968), totalling approximately $1,000,000 for tax years 1956 through 1963, and a judgment entered in this case for approximately $590,000 for tax years 1969 through 1976.

Shades Ridge argues six points on appeal relating to the district court's failure to give proper effect to prior litigation, the insufficiency of the evidence to prove alter ego and fraudulent conveyance, and whether one of the prior judgments had been satisfied as a matter of law. This opinion will discuss the arguments seriatim, and detail facts as are necessary in the decision of each.

Briefly, the Government contends that since 1957, taxpayer has run a gambling operation offering his customers poker, sports betting, dice games, and blackjack. This gambling business has been so lucrative it has generated income resulting in taxpayer having more than $4 million in unpaid federal tax liabilities. Taxpayer and Shades Ridge have been litigating taxpayer's tax liability since 1964.

## I. *Res Judicata as to 1987 Tax Court Decisions*

[1] Appellants' argue that a 1977 district court judgment precluded by res judicata the reduction to judgment of income tax liabilities determined in 1987 tax court decisions. Although the district court, after an evidentiary hearing, ruled the prior litigation did not involve the same causes of action and therefore was not res judicata, it also ruled that taxpayer waived his right to raise the affirmative defense of res judicata in subsequent proceedings when he failed to raise it in tax court, when

the assessments were determined. We affirm the district court on this legal waiver ground, and need not discuss the details of the complex litigation.

The rule governing the pleading of affirmative defenses in tax court, requires that

> A party shall set forth in his pleading any matter constituting an avoidance or affirmative defense, including res judicata, collateral estoppel, estoppel, waiver, duress, fraud, and the statute of limitations. A mere denial in a responsive pleading will not be sufficient to raise any such issue.

Rule 39, 6 I.R.C. foll. § 7453.

The rule requires that affirmative defenses, such as res judicata must be raised initially in tax court. *Brutsche v. Commissioner*, 585 F.2d 436 (10th Cir.1978) (doctrine of election as affirmative defense). *See also* R. 34(b)(4) I.R.C. foll. § 7453 (tax court petition must contain clear and concise assignments of every error allegedly committed by the Commissioner in his deficiency determinations.

Fiorella petitioned the tax court for a redetermination of the tax deficiency, challenged the deficiency in several respects, but did not assert then that the assessments were precluded by res judicata. Taxpayer argues that even though the defense should have been raised in tax court, it is not waived because it was raised in district court when the Government sought to reduce the assessment to judgment. The gist of taxpayer's argument is that a final judgment was not entered in the case until the district court entered judgment; res judicata was raised in the district court; thus, it was timely raised. Taxpayer cited no case either in his briefs or during oral argument in support of his proposition, nor has this court found any cases to support this argument.

This same procedure was followed by a taxpayer and rejected in *United States v. Wynshaw*, 516 F.Supp. 785 (S.D. N.Y.1981), *aff'd on other grounds*, 697 F.2d 85 (2d Cir.), *cert. denied*, 464 U.S. 822, 104 S.Ct. 87, 78 L.Ed.2d 96 (1983). In *Wynshaw*, the Government sought to reduce to judgment income tax assessments against taxpayer. Taxpayer raised a defense in district court that she had not raised in the prior tax court proceeding. The court granted the government's summary judgment motion, finding that taxpayer was "attempting to litigate an issue which is without doubt a matter that could have been offered to challenge the assessment in Tax Court." *Id.* 89.

Taxpayer's rationale that the tax court decision is not a final judgment is equally without merit. A tax court decision is considered final upon the affirmative or dismissal after a notice of appeal or the expiration of that time. I.R.C. § 7481(a)(1).

Taxpayer may be attempting to assert that the district court has authority to hear taxpayer's defense in the first instance pursuant to I.R.C. section 7403, which provides that

> [t]he court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property. . . .

I.R.C. § 7403(c). The cases holding that the taxpayer "may challenge the underlying merits of the assessment" in district court, however, do not involve prior Tax Court action, and are cases where the litigants' first opportunity to challenge the assessment in any court did not occur until the district court foreclosure action. *United States v. Lease*, 346 F.2d 696, 698 (2d Cir.1965); *United States v. Connor*, 291 F.2d 520, 527 (2d Cir.1961); *United States v. Mauro*, 243 F.Supp. 413 (S.D.N.Y.1965); *United States v. Camejo*, 666 F.Supp. 1542 (S.D.Fla.1987).

## II. *1982 Tax Court Decisions*

[2] Taxpayer contends that the 1982 tax court decisions in *Shades Ridge v. Commissioner*, Nos. 7284-77 and 12290-78 (T.C. Nov. 8, 1982) are res judicata as to the Government's present attempt to collect Fiorella's tax liability from Shades Ridge's assets by an alter ego and fraudulent conveyance or use cause of action. Essentially, Fiorella argues that the cause of action the government now asserts against Shades Ridge was asserted in the 1982 tax court cases against Shades Ridge. Taxpayer asserts that the government was required to pursue its claims against Shades Ridge as Fiorella's transferee at the same time it brought an action to establish Shades Ridge's tax liability.

The district court in its memorandum opinion entered November 12, 1987, correctly held that the 1982 Tax Court judgments are not a bar to the nominee or transferee claim proceeding in this case against Shades Ridge. *Shades Ridge Holding Co. v. United States*, No. CV85-PT-2526-S (N.D.Ala. Nov. 12, 1987). It is not necessary to repeat that carefully reasoned opinion.

## III. *Nominee/Fraudulent Transferee Claims*

Fiorella contends that the Government failed to offer sufficient evidence to support the district court's decision that Shades Ridge was the alter ego/nominee of Fiorella.

[3] The district court applied the correct principles of law. Property of the nominee or alter ego of a taxpayer is subject to the collection of the taxpayer's tax liability. *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 350-51, 97 S.Ct. 619, 627-628, 50 L.Ed.2d 530 (1977). Although the district court found it unclear as to whether state or federal law governs

this issue, the standards are so similar that the distinction is of little moment. *See United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 690 n. 5 (5th Cir.1985), *cert. denied*, 475 U.S. 1014, 106 S.Ct. 1194, 89 L.ED.2d 309 (1986). The issue under either state or federal law depends upon who has "active" or "substantial" control. *Valley Finance, Inc. v. United States*, 629 F.2d 162, 172 (D.C.Cir.1980), *cert. denied sub nom, Pacific Development, Inc. v. United States, 451 U.S. 1018, 101 S.Ct. 3007, 69 L.Ed.2d 389 (1981).*

[4] Whether a corporation is a taxpayer's nominee turns on: (1) the control taxpayer exercises over the nominee and its assets; (2) the use of corporate funds to pay taxpayer's personal expenses; and (3) the family relationship, if any, between the taxpayer and the corporate officers. *Valley Finance, Inc. v. United States*, 629 F.2d at 171-72; *Loving Saviour Church v. United States*, 728 F.2d 1085, 1086 (8th Cir.1984).

[5] Applying these factors to the instant case, the district court in its 42-page Findings of Fact and Conclusions of Law extensively outlined the history of the relationship between Fiorella and his family members with Shades Ridge. *Shades Ridge Holding Co. v. United States*, No. CV85-PT-2526-S (N.D.Ala. Dec. 17, 1987). The court found that Fiorella "was ever present and ever involved in the business decisions of Shades Ridge and moved his family members in and out of control at will" and that there "is no family members, other than Fiorella, who truly controlled Shades Ridge at any time." The district court's findings are not clearly erroneous.

The fact that there is no evidence that Fiorella owned stock in Shades Ridge does not affect the district court's ruling. The absence of stock ownership is not dispositive. *Krivo Industrial Supply Co. v. National Distillers & Chemical Corp.*, 483 F.2d 1098, 1104 (5th Cir.1973) (absence of stock ownership in cor-

poration does not preclude application of the instrumentality rule "where action and total control has been otherwise established"). That no one testified that Fiorella controlled Shades Ridge is of no consequence in the view of the ample evidence

—that Shades Ridge's primary source of income was Fiorella's gambling earnings,

—that Shades Ridge's income and assets were used for the personal benefit of taxpayer and his family,

—that none of Fiorella's family members actually controlled Shades Ridge,

—that Fiorella was present at the office on a daily basis, participated in all decisions concerning Shades Ridge property, and attended all meetings regarding its corporate decisions,

—that Fiorella even assisted in company decision-making while he served time in prison for income tax evasion.

The record reflects substantial evidence to support the district court's decision.

IV. *Objection to Admission of Evidence Predating 1968*

Fiorella contends that the district court erred in allowing the admission of evidence indicating alter ego or fraudulent conveyance prior to 1968, because a judgment entered against him that year disposed of claims based on the same theories involving transactions prior to 1968, so that it was res judicata as to any subsequent proceeding involving the same claims and the same tax years.

That was a final judgment entered pursuant to a compromise and settlement between the parties, in the amount of $1,004,-

552.56, plus interest. *United States v. Fiorella*, No. 64-391 (N.D.Ala. Jan. 3, 1968).The court also ordered, among other things, that shares of stock of Shades Ridge be discharged from any federal tax liens, and that the actions be dismissed with prejudice as to Shades Ridge.

[6] Since neither res judicata nor collateral estoppel can be used to exclude evidence used in a previous action, the district court properly considered Fiorella's argument based on the relevance or remoteness of the pre-1968 evidence. *Shades Ridge Holding Co. v. United States*, No. CV85-PT-2526-S (N.D.Ala. Nov. 12, 1987). Res judicata is not a doctrine limiting evidence, but a rule preventing a *claim* tried in one suit from being relitigated in a second suit. *See Thomas v. Commissioner*, 324 F.2d 798, 799 (5th Cir.1963). The doctrine of collateral estoppel does not bar the introduction of evidence.

[7] *Thomas v. Commissioner*, 324 F.2d 798 (5th Cir.1963), cited by Fiorella, is distinguishable from the instant case. In *Thomas*, the issue was whether taxpayers were entitled to deduct losses they sustained during 1956-58 for the operation of a farm they contended was run as a for-profit business. This Court held that the tax court had to recognize the binding effect of a prior judgment based on a special jury verdict that expressly found that plaintiffs had operated the farm for profit in 1955. Here, the 1968 court made no express finding as to the alter ego/fraudulent conveyance theories nor is there any such finding implicit in the judgment entered pursuant to a compromise among the parties.

The government is probably correct in arguing that any error in admitting the evidence would be harmless, since the evidence of facts and events occurring after January 3, 1968 is sufficient to support the finding that Shades Ridge was taxpayer's alter ego.

## *V. Plea Bargain Agreement*

[8] Fiorella argues that this action is barred by a plea agreement he entered with the Government in 1976. On December 17, 1975, a federal grand jury indicted Fiorella for conspiracy to evade the payment of federal taxes by concealing assets, and for federal income tax evasion for calendar tax years 1969 through 1972. On April 14, 1976, the United States and Fiorella entered into a plea bargain agreement with respect to these charges. Also on April 14, 1976, under the terms of the lea bargaining agreement, Fiorella was sentenced to one year and one day at the Federal Correctional Institution at Maxwell Field, Montgomery, Alabama and agreed to pay $200,000 in settlement of outstanding civil judgments.

Fiorella contends that, under the terms of the agreement, the Government agreed to absolve Shades Ridge from any liability for Fiorella's tax debts if Shades Ridge guaranteed the payment of the $200,000. Shades Ridge did guarantee payment in the form of a mortgage and a note. Fiorella satisfied his part of the plea bargain by serving the time in prison.

The district court in its findings of fact and conclusions of law entered November 18, 1986, correctly interpreted the agreement as contemplating separate settlements of Fiorella's criminal and Fiorella and Shades Ridge's civil liability. *Shades Ridge Holding Co. v. United States,* No. CV85-PT-2526-S (N..D.Ala. Nov. 18, 1986). The following language was in the agreement:

> It is further agreed and understood that acceptance of *this offer* by the United States completely absolves and releases the present assets of Shades Ridge Holding Company, Inc. from *any and all liability for taxes owed by Sam A. Fiorella up to the date of this agreement.*

The district court's finding that the Government rejected the offer as to the civil shows that Shades Ridge was not absolved from liability by the agreement. Any ambiguity is resolved by the transcript of the sentencing hearing in which the court asked Fiorella's attorney, Mr. Bowen, whether refusal of the civil authorities to accept the settlement of the civil liabilities would in any way affect the agreement with respect to the criminal cases, and Bowen stated no, whether they accepted had no bearing on the validity of the proceedings.

Because this issue is decided on the factual basis of the agreement itself, it is not necessry to reach the question whether the Assistant United States Attorney had authority to compromise Fiorella's tax liability.

## VI. Enforceability of January 1988 Judgment

The last issue addressed by the parties concerns whether the district court erred in denying Fiorella's Motion for Relief From Judgment or in the Alternative to Alter or Amend the Judgment on the ground that the January 3, 1968 judgment was not enforceable after January 3, 1988, as a matter of state law. Another panel of this Court affirmed the district court in *United States v. Fiorella*, F.2d 1425 (11th Cir. 1989).

AFFIRMED.

**UNITED STATES of America,**
**Plaintiff-Appellant,**

**v.**

**Sam FIORELLA, Katherine Fiorella, Shades Ridge Holding Company, Inc., Melina Fiorella, Grace Tortomasi, Pritchard, McCall & Jones, a partnership, Defendants-Apppellees.**

**No. 87-7717.**

United States Court of Appeals, Eleven Circuit.

April 10, 1989.

Appeal from the United States District court for the Northern District of Alabama.

Before RONEY, Chief Judge,
JOHNSON and SMITH*, Circuit Judges.

EDWARD S. SMITH, Circuit Judge:

In this judgment revival case, the United States District Court for the Northern District of Alabama, in an order dated September 29, 1987, denied the United States' (Governement) motion to revive a January 3, 1968, district court judgment against Sam A. Fiorella (Fiorella). We affirm.

*Issue*

The sole issue on appeal is whether the district court erred by denying the Government's motion to revive the judgment of January 3, 1968.

*Background*

The facts are not disputed. On July 1, 1964, the Government commenced an action in district court against Fiorella,

Fiorella's wife, and Shades Ridge Holding Company. The Government sought, *inter alia* both to recover income taxes assessed against Fiorella for the 1956 through 1958 tax years and to foreclose the federal tax liens on all property and rights of property 3, 1968, the district court, pursuant to a settlement between the parties involved in the action, entered judgment against Fiorella in the amount of $286,727.75 and directed that Fiorella's prior cash payment of $107,500 be credited to the judgment.[1]

On January 19, 1978, the Government, asserting that $179,227.75 remained unpaid, filed a motion to revive the judgment of January 3, 1968.[2] The district court, in an order dated February 17, 1978, granted the Government's motion to revive the January 3, 1968, judgment so as to give the judgment life until January 3, 1988.[3]

Approximately 10 years later, the Government filed a second motion to revive the judgment of January 3, 1968, which would extend the life of the judgment until January 3, 1998. In an order dated September 29, 1987, the district court denied the Government's second motion to revive, holding that it would be a violation of Alabama law to extend the life of the judgment beyond January 3, 1988.[4] For the reasons set forth below, we hold that the district court did not err in denying the Government's second motion to revive the judgment of January 3, 1968.

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[1] *United States v. Fiorella*, No. 64-391 (N.D.Ala. Jan. 3, 1968).

[2] The January 3, 1968, judgment had become dormant by operation of Ala.Code § 6-9-192 (1975) (no execution shall issue on a judgment on which an execution has not been sued out within 10 years of its entry until the same has been revived by appropriate motion or action).

[3] *United States v. Fiorella*, NO. 64-391 (N.D.Ala. Feb. 17, 1978).

[4] *United States v. Fiorella*, No. CV64-391-S (N.D.Ala. Sept. 29, 1987).

*Analysis*

It is well settled that Alabama law controls the procedure on the execution of a judgment rendered in a district court located in Alabama.[5] Further, Alabama Code § 6-9-190, provides that a judgment cannot be revived after the lapse of 20 years from its entry.[6] The district court, in its denial of the Government's motion to revive judgment, held that it would be a violation of Alabama law to continue the vitality of the January 3, ,1968, judgment beyond January 3, 1988. We agree.

Generally, the United States is not subjec to local statutes of limitations.[7] However, Alabama Code § 6-9-190, which effectively limits the time for issuing executions on judgments, is not a statute of limitations and operates the same against the United States as it operates against private parties.[8]

The Government's principal contention is that the underlying tax lien continues to exist independently of the January 3, 1968, district court judgment. The Governent argues that, since the tax lien continues until it is satisfied, the act of reducing the tax ien to judgment does not subject the tax lien to state limitations on the enforcement of judgments. We do not decide this issue. Here, the sole issue properly before this court is whether the January 3, 1968, judgment is now capable

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[5]Fed.R.Civ.P. 69(a) (1982) ("[t]he procedure on execution [of district court judgments], in proceedings supplementary to and in aid of a judgment * * * shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable").

[6]Ala.Code §6-9-190 (1975); *see Henry v. State ex rel. Rambow*, 16 Ala.App. 670, 81 So. 190 (1919).

[7]*United States v. John Hancock Mut. Life Ins. Co.*, 364 U.S. 301, 81 S.Ct. 1, 5, 5 L.Ed.2d 1 (1960); *United States v. Summerlin*, 310 U.S. 414, 416, 60 S.Ct. 1019, 1020, 84 L.Ed. 1283 (1940).

[8]*Custer v. McCutcheon*, 283 U.S. 514, 519, 51 S.Ct. 530, 531, 75 L.Ed. 1239 (1931).

of being revived under Alabama law. We agree with the trial court that it is not. We do not decide whether the tax lien underlying the January 3, 1968, judgment remains enforceable.

*Conclusion*

In view of the foregoing, we hold that the district court properly applied Alabama law and properly denied the Government's motion to revive the judgment of January 3, 1968. However, we decline to consider the enforceability of the underlying tax lien since this issue is not properly before this court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

| | | |
|---|---|---|
| SHADES RIDGE HOLDING CO., INC. | ) | |
| Plaintiff, | ) | |
| v. | ) | CIVIL ACTION NO: CV85-PT-2526-S |
| UNITED STATES OF AMERICA, | ) | |
| Defendant. | ) | |
| and | ) | |
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | |
| v. | ) | CIVIL ACTION NO: CV86-PT-1415-S |
| SAM A FIORELLA and SHADES RIDGE HOLDING COMPANY, INC., | ) | |
| Defendants. | ) | |

## AMENDED JUDGMENT

This court's Final Judgment and Decree of Foreclosure of December 29, 1987 in the above styled case is hereby AMENDED as follows:

Paragraph 6 — the phrase "are hereby foreclosed" is deleted and the phrase "entitled to foreclose its said liens" is to be substituted in its place.

DONE and ORDERED this 28 day of January, 1988.

/s/ Robert B. Propst
ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

ENTERED
JAN 28 1988 /s/hgc

FILED
88 JAN 28 PM 3:5
U.S. DISTRICT COURT
N.D. OF ALABAMA
C.T. OLIVER CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

| | | |
|---|---|---|
| SHADES RIDGE HOLDING CO., INC. | ) | |
| Plaintiff, | ) | |
| v. | ) | CIVIL ACTION NO: CV85-PT-2526-S |
| UNITED STATES OF AMERICA, | ) | |
| Defendant. | ) | |
| and | ) | |
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | |
| v. | ) | CIVIL ACTION NO: CV86-PT-1415-S |
| SAM A FIORELLA and SHADES RIDGE HOLDING COMPANY, INC., | ) | |
| Defendants. | ) | |

## ORDER

This cause comes on to be heard on the Motion For Relief From Judgment Or In The Alternative To Alter Or Amend The Judgment Entered By The Court On December 29, 1987 filed by defendants Sam A. Fiorella and Shades Ridge Holding Company, Inc. on December 31, 1987.

Said motion will be DENIED. *See United States v. Overman*, 424 F.2d 1142, 1147 (9th Cir. 1970).[1] *See also United States v. Hode*, 355 F.2d 746 (2nd Cir. 1966). The movants have not raised an issue as to the *form* of the judgment. The court *sua sponte* raised the issue as to whether the judgment should provide that the tax liens "are hereby foreclosed" (as presently provided) or whether it should provide that the United States is "entitled to foreclose its said liens." The United States has agreed to the latter language. The court understands that, in either event, the sale of the properties would be conducted in the same manner and subject to the same rights and obligations as to notice, redemption, etc. This being the case, the court will not alter the judgment, unless, within one week, the movants so request. The said motion is OVERRULED and DENIED.

DONE and ORDERED this 22 day of January, 1988.

/s/ Robert B. Propst
ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

ENTERED
JAN 28 1988 /s/hgc

FILED
88 JAN 28 PM 11:56
U.S. DISTRICT COURT
N.D. OF ALABAMA
C.T. OLIVER CLERK

[1]The Court does not note any indication in the legislative history attendant to the Tax Reform Act of 1966 which would indicate that the amended Act changes the *Overman* holding.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

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|---|---|
| SHADES RIDGE HOLDING CO., INC.<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES OF AMERICA,<br><br>Defendant. | CIVIL ACTION NO. CV85-PT-2526-S |
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>SAM A FIORELLA and SHADES RIDGE HOLDING COMPANY, INC.,<br><br>Defendants. | CIVIL ACTION NO. CV86-PT-1415-S |

## FINAL JUDGMENT AND DECREE OF FORECLOSURE

This cause having been tried before the Court without a jury, it is hereby

ORDERED, ADJUDGED, and DECREED in accordance with the Findings of Fact and Conclusions of Law entered on December 17, 1987, that:

1. Shades Ridge Holding Company, Inc., was, at all pertinent times, and is the nominee, instrumentality and alter ego of Sam A. Fiorella.

2. Shades Ridge Holding Company, Inc., is the fraudulent transferee of Sam Fiorella.

3. Sam A. Fiorella is the true owner of all property, both real and personal, of Shades Ridge Holding Company, Inc., including the following:

a. That parcel of real property referred to in these proceedings as the Kid McCoy Farm, and described more particularly as follows:

Parts of Section 23, 24, 25 and 26, in Township 19, Range 3 West, described as follows: Commence at the SW corner of Section 24, Township 19, range 3 West; thence East 417.55 feet to the point of beginning of the tract herein conveyed, thence at an angle to right of 132° 34' for 376.86 feet; thence at an angle to left of 20° 36' for 358.37 feet; thence at an angle to right of 57° 22' for 389.8 feet; thence, at an angle to left of 25° 50' for 954.75 feet; thence at an angle to right of 93° 3' for 287.7 feet; thence at an angle left of 92° 22' for 311.3 feet; thence at an angle left of 6° 5' for 329.65 feet; thence at an angle right of 19° 7' for 314.25 feet to the center line of Cahaba River; thence up stream and in Northerly direction and Northeasterly direction to the intersection with the Westerly line of right of way of Montgomery Higway; thence in Southeast direction on said highway 1149.20 feet; thence at an angle to right of 72° 56' for 56.24 feet more or less to point of beginning and containing 65 7/10 acres.

b. That parcel of real property referred to in these proceedings as the Highway 150 Property, and described more particularly as follows:

That part of the Southeast Quarter of Southwest Quarter of Section 13, Township 19 South, Range 3 West, situated in Jefferson County, Alabama, more particularly described as follows:

Commence at the Southeast corner of said quarter-quarter section, thence northerly along the east line thereof 749.44 feet to the Northwesterly right of way of Highway No. 150 and the point of beginning of the property herein described; thence continue on the last named course 26.62 feet; thence 39° 07' to the left in a northwesterly direction 213.97 feet; thence 96° 29' to the left in a southwesterly direction 245.27 feet; thence 81° 50' to the left in a southeasterly direction 170.82 feet to the northwesterly right of way of said Highway No. 150, and the intersection of a curve which radius is 4523.70 feet and subtended by a central angle of 2° 59' 24" to the left; thence along the arc of said curve 234.75 feet to the point of beginning.

c. That parcel of real property referred to in these proceedings as the Anniston Property, and described more particularly as follows:

A tract or parcel of land in the City of Anniston, more particularly described as follows: Beginning at a point on the west line of Walnut Avenue 185.5 feet south of the intersection of the south line of 14th Street with the West line of Walnut Avenue of said point beging the property lying between the property of Shanesey and Kay and Lowell Tyson; thence west a distance of 138.08 feet to a point on the L & F right of way; thence in a southeasterly direction along the easterly right of way of said railroad a distance of 63.77 feet; thence east forming an interior angle of 101° 15'

a distance of 125.7 feet to a point on the west line of Walnut Street; thence in a northerly direction along said west line of Walnut, making an interior angle of 90° 00' a distance of 62.5 feet to the point of beginning. Subject to party wall agreement involving north wall of the building situated on this lot and subject to any slight encroachment for said party wall.

4. Except as provided in paragraph 5, *infra*, the federal tax liens and judgment liens of the United States described below attach to the ownership interest of Sam A. Fiorella in and to all property of Shades Ridge Holding Company, Inc., including the three parcels of real property described in paragraph 3, *supra:*

a. Interlocutory Judgment entered in this action on January 6, 1987, in the amount of $590,539.11 plus statutory interest, for Sam A. Fiorella's unpaid federal income taxes, penalties and interest for the tax years 1969, 1970, 1971, 1972, 1973, 1974, 1975 and 1976, and the federal tax liens securing such unpaid liabilities.

b. Final Judgment entered in Civil Action No. 64-291 on January 3, 1968, in the net amount of $179,227.75, plus statutory interest, for Sam A. Fiorella's unpaid federal income taxes, penalties and interest for the tax years 1956, 1957 and 1958, and the federal tax liens securing such unpaid liabilities.

c. Final Judgment entered in Civil Action No. 65-774 on January 3, 1968, in the net amount of $825,324.81, plus statutory interest, for Sam A. Fiorella's unpaid wagering excise taxes, wagering, occupational taxes, penalties and interest for the periods November, 1951 through July, 1958, inclusive, and the federal tax liens securing such unpaid liabilities.

5. The judgment liens arising as the result of the Final Judgment described in paragraphs 4b and 4c, *supra*, and the federal tax liens securing the unpaid liabilities covered by said Final Judgment, shall not attach to the ownership interest of Sam A. Fiorella in and to the real property described in paragraph 31, *supra*, but such liens do attach in full force and effect to any other property of Shades Ridge Holding Company, Inc., including the real property described in paragarph 3b and 3c, *supra*.

6. The federal tax liens and judgment liens of the United States described in paragraph 4, *supra*, are hereby foreclosed and the three parcels of real property described in paragraph 3, *supra*, shall be sold free and clear of the liens and claims of the parties herein.

7. A separate Order of Sale shall be entered with respect to any sale pursuant to this Judgment and Decree of Foreclosure.

DONE and ORDERED this 29 day of Dec., 1987.

/s/ Robert B. Propst
ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

ENTERED
DEC 29 1987 /s/hgc

FILED
DEC 29 1987
U.S. DISTRICT COURT
NORTHERN DISTRICT
OF ALABAMA
C.T. OLIVER CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

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|---|---|---|
| SHADES RIDGE HOLDING CO., INC. | ) | |
| Plaintiff, | ) | |
| v. | ) | CIVIL ACTION NO: CV85-PT-2526-S |
| UNITED STATES OF AMERICA, | ) | |
| Defendant. | ) | |
| and | ) | |
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | |
| v. | ) | CIVIL ACTION NO: CV86-PT-1415-S |
| SAM A FIORELLA and SHADES RIDGE HOLDING COMPANY, INC., | ) | |
| Defendants. | ) | |

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court now addresses, after a final bench trial, the remaining issues in this case.[1]

[1]The case came under submission on November 25, 1987 after the parties had requested an extensive period for suggesting proposed facts and briefing.

On September 24, 1985, Shades Ridge Holding Company, Inc. (hereinafter Shades Ridge) filed its Complaint to Quiet Titie against the United States of America. By its Complaint, Shades Ridge seeks to invalidate federal tax liens which arose with respect to assessments of federal income taxes, penalties and interest against Sam A. Fiorella (hereinafter Fiorella) for Fiorella's calendar tax years 1969 through 1976. On July 31, 1986, the United States filed its complaint against Shades Ridge and Fiorella, seeking to reduce to judgment its assessments against Fiorella and to foreclose its tax liens and judgment liens for Fiorella's unpaid federal tax liability against all property titled to Shades Ridge on a theory that Shades Ridge is the nominee or fraudulent transferee of Fiorella. On August 19, 1986, the two suits were consolidated.

In its Interlocutory Judgment entered on January 6, 1987, the court entered judgment in favor of the United States against Fiorella in the amount of $590,539.11, plus statutory interest. The judgment is for Firorella's federal income tax liability for 1969 through 1976. The judgment liens, which the United States seeks to foreclose upon the assets of Shades Ridge, arise from a Final Judgment entered in this court in 1968 in the amount of $1,004,552.56, plus interest, and from the Interlocutory Judgment described above. The 1968 Final Judgment was for $286,727.75 on Civil Action No. 64-291 and $832,824.81 on Civil Action No. 65-774, with credit to be given for payments of $107,500 and $7,500. The net amount of the 1968 Final Judgment, therefore, is $1,004,552.56 plus interest. The judgment in Civil Action No. 64-291 was for Fiorella's income tax liability for 1956 through 1958. The judgment in Civil Action No. 65-774 was for Fiorella's wagering tax liability for November 1951 through July 1958 and for income taxes for 1959 and 1961-1963.

The issues before the court are whether Shades Ridge is the nominee or fraudulent transferee of Fiorella and, if so,

whether the United States is entitled to foreclose upon the assets of Shades Ridge to satisfy the tax liens against Fiorella in the amount of $590,539.11 plus interest and the judgment lien against Fiorella in the amount of $1,004,552.50 plus interest.

The first assessment against the Fiorellas and/or Shades Ridge by the IRS which is at issue in this case was made on July 29, 1959. The formation of Shades Ridge and the transfers of the property of the corporation all took place before said assessment by the IRS described above.

## General History

Fiorella has been engaged in the gambling business in the Birmingham area throughout his adult life and for at least the last forty years before 1986. Fiorella invoked his fifth Amendment right against self-incrimination with respect to his occupation in 1987. In a letter to Judge Allgood which Fiorella wrote while in prison in the last 1970's, Fiorella admitted that he has had "success in gambling" and that he was an "established store;" that is, he either had money to back up his gambling operation or he could readily obtain money for that purpose. Fiorella first started gambling when he left his employment with a railroad forty years ago. Since that time, he has had no other occupation besides gambling and holding the title of "Chairman of the Board" of Shades Ridge.

In the late 1940's and 1950's, Fiorella ran a lottery game and had access to large amounts of cash. During this period, Fiorella hid cash "everywhere," including around the house and in his pocket. On and off since 1957, and at least as recently as 1986, Fiorella has run a gambling operation: that is, a place where customers could come for gambling purposes. Fiorella

has offered his customers various types of gambling, including poker, sports betting, dice games and blackjack. Fiorella has conducted casino gambling operations at the Kid McCoy farm since the 1950's and as recently as 1981, and his gambling operations at the Kid McCoy farm have been raided by law enforcement authorities.

Fiorella's gambling activities have generated income to Fiorella resulting in his having unpaid federal tax liabilities in excess of $4 million including penalties and interest. Fiorella has frequently conducted financial transactions in cash. He has had $500 and $1,000 bills in his pocket. From 1956 to 1958, Fiorella was found by the United States Tax Court to have failed to keep records, to have dealt only in cash and to have kept no bank accounts or property in its own name "so that it would be most difficult for anyone to check his income or net worth in any way." Since 1958, Fiorella has kept no records of money he has spent, borrowed or loaned.

Fiorella has been convicted of gambling offenses in the Northern District of Alabama within the last ten years on two occasions: Docket Nos. CR77-G-274-S and CR83-AR-112-S. Fiorella's sentence for one gambling conviction was extended after he pled guilty to conducting gambling operations in federal prison.

Fiorella has not had any property titled in his name since 1957. Fiorella has had no bank account in his name since the 1950's. Fiorella has not lived in a house titled in his name since at least 1953. He has lived at various times rent free at the following residences:

(a) the Pizitz property (titled to his wife and to Shades Ridge during his residence);

(b) the Overlook property (titled to his daughters during his residency);

(c) the Vestavia Park Apartments (titled to Shades Ridge during his residency); and

(d) the Kid McCoy farm (titled to Shades Ridge since 1957).

Shades Ridge Holding Company was formed in 1957. The Pizitz property, which later became the Vestavia Park Apartments, was transferred to Shades Ridge in 1957. The Avondale Apartments were transferred to Shades Ridge in 1957. The Kid McCoy property was transferred to Shades Ridge in 1957.

Fiorella has not had an automobile titled in his name since the 1950's. Fiorella currently drives a Cadillac, which is titled to the Melina Fiorella Trust, of which he is Trustee and of which his daughters are the beneficiaries.

In 1976, Fiorella pled guilty to charges of tax evasion, Docket No. CR75-M-594-S. At his sentencing hearing in Docket No. CR75-M-594-S, Fiorella admitted, *inter alia*, that the allegations of the government were substantially true, and that he had maintained no substantial assets in his own name, but rather, that he had maintained his and his family's assets in the names of Shades Ridge and other nominees. Fiorella served a prison sentence for gambling and tax evasion from June 6, 1976 through 1980.

Fiorella filed federal income tax returns for the tax years 1983 and 1984. Fiorella invoked his Fifth Amendment right against self-incrimination with respect to whether these returns show all the income Fiorella had in 1983 and 1984. Fiorella invoked his Fifth Amendment right against self-incrimination when asked if he filed federal income tax returns for the tax years 1986, 1985, 1982, 1981 and 1980.

Fiorella has told people that he is the owner of Shades Ridge, the Kid McCoy farm, the Highway 150 property and the An-

niston liquor store. Fiorella's parents never gave him any property during their lifetimes. Fiorella's parents did not have any source of substantial income during their lifetimes.

Fiorella and his wife Katherine (Katherine) were married in 1947. Fiorella and Katherine had two daughters, Melina (born in 1949) and Samelia (born in 1952). Katherine worked outside the home in the 1940's at clerical jobs, earning less than $2,000 per year. Other than salaries received from Shades Ridge in 1971 and 1972, Katherine did not earn any salary from any source from 1948 until her death. Katherine never operated a numbers game or lottery. There is no substantial evidence that she participated in Fiorella's gambling activities.

Katherine's mother, Catherine W. Tucker, was a housewife who did not earn a salary during her lifetime. Katherine's mother was claimed as a dependent on the Fiorellas' income tax returns for the years 1951 through 1957, inclusive. Katherine's parents never gave any property to Fiorella. Katherine's parents "might have given" some property to Katherine.

When Fiorella was out of the state during World War II, Katherine sent Fiorella $10 for a bus ticket home which Fiorella increased to $35,000 through his gambling activities. Fiorella sent this $35,000 and some of his other winnings to Katherine. Fiorella provided Katherine with the necessary money for living expenses in cash, and other than the employment described herein, Katherine did not have any independent source of income. Fiorella testified that his family was "lucky to buy bread" during this early time. Fiorella gave Katherine more than $1,000 cash on more than one occasion. Katherine was not a businesswoman and did not have a reputation as a businesswoman. Katherine did not ever discuss business matters with Grace Tortomasi, her sister-in-law and close friend. From approximately 1954 until her death in 1977, Katherine had a severe alcohol and prescription drug abuse problem as

well as psychological problems, all of which periodically incapacitated her for weeks at a time as a result of which she was sometimes hospitalized. Katherine died in April 1977.

Fiorella's daughter, Samelia, has been married to David Brooks ("Rowe") Thomas since 1970. They have two children. David Thomas, has in the past engaged in gambling operations with Fiorella and has been convicted for gambling offenses. Fiorella's daughter, Melina, was married to Hugh Lockhart Davis and was divorced from Davis around 1980. They have three children. Melina and Samelia are currenlty the sole shareholders of Shades Ridge. Melina and Samelia have considerable amounts of property titled in their names.

Neither Melina nor Samelia have ever held a job or earned a salary at any time (other than Shades Ridge), but have received rental income from properties which they own. Melina has recently been hospitalized for psychiatric maladies and was so hospitalized at the time of trial. Neither Melina nor Samelia are adept at handling financial matters, and therefore, Fiorella's brother-in-law, Joe Tortomasi, handles their finances.

James L. ("Pete") Thomas, an employee of the Internal Revenue Service for 17 years ending in 1965, was hired by Fiorella in 1966 to perform accounting work. Pete Thomas had a business relationship with Fiorella and Shades Ridge from 1966 through 1979.

Shades Ridge was incorporated on May 27, 1957. Shades Ridge was formed by Jim Gibson, a Birmingham lawyer who advised Fiorella and Katherine. The original shareholders of Shades Ridge were Katherine (eight shares), Fiorella's mother, Melina Fiorella, (one share), and Fiorella's sister, Grace Tortomasi, (one share). Grace Tortomasi received her share of stock in Shades Ridge because she was Fiorella's sister and Samelia's godmother.

At the time of its incorporation, Shades Ridge was capitalized by the transfer of three parcels of property into the corporation: the Kid McCoy farm, the Fiorella residence or "Pizitz" property, and the Avondale rental property. The Kid McCoy farm transferred to Shades Ridge in 1957 was purchased in 1953 by Joe Tortomasi (Fiorella's brother-in-law) and Leon Thomasino. Fiorella advanced the purchase money to both Tortomasi and Thomasino. At the time Fiorella advanced the purchase money for the Kid McCoy farm, Fiorella was negotiating with the Internal Revenue Service with respect to a "'tax statement' sent to Fiorella by the Internal Revenue Service and he testified that he ultimately satisfied that indebtedness to the IRS. At the time Fiorella advanced money to Thomasino and Tortomasi for the purchase of the Kid McCoy property, his only apparent source of income was from gambling activities. In 1956, Thomasino deeded his interest in the Kid McCoy farm to Katherine Fiorella and Sam Fiorella for no consideration. In 1957, Fiorella and Tortomasi transferred to the Kid McCoy farm to Shades Ridge with no apparent consideration other than stock in the corporation. The Kid McCoy farm was used from 1953 through 1957 for Fiorella's gambling operations, and for other personal uses of the Fiorella family such as keeping horses, swimming, and barbecuing. Katherine, in her testimony in 1967, did not know why the Kid McCoy farm was transferred to Shades Ridge except that it was upon the advice of attorney Gibson.

The Pizitz property transferred to Shades Ridge in 1957 was titled to Katherine prior to the transfer and was the residence of Fiorella and Katherine. In her testimony in 1967, Katherine was unable to recall any details of how she purchased the Pizitz property, why the residence was titled in her name in 1955, and how payment of the mortgages on the property was handled. In her 1967 testimony, Katherine did not recall why the Pizitz property was transferred to Shades Ridge, but remem-

bered only that the property was transferred to Shades Ridge pursuant to the advice of attorney Gibson. Fiorella and Katherine continued to live at the Pizitz property after its transfer to Shades Ridge, and they did not pay rent to Shades Ridge for their use of the property.

The Avondale rental property transferred to Shades Ridge in 1957 had been titled to Katherine in 1955. Katherine testified that her mother, Catherine W. Tucker, held a $15,000 mortgage on this property after loaning this amount, her life savings, to Katherine. In her 1967 testimony, Katherine was unable to recall how much she had paid for the Avondale property, how she paid for the Avondale property, the purpose of the mortgage to her mother on the property, or whether she received cash from her mother upon execution of the mortgage. The Avondale property was transferred back into Katherine's name by Shades Ridge during 1962.

The transfers of property to capitalize Shades Ridge in 1957 were done at the direction of Gibson. Katherine, during her 1967 testimony, did not recall anything about the issuance of Shades Ridge stock, except that Gibson handled the transaction. Katherine, in her 1967 testimony, did not know why Shades Ridge was set up in 1957. Gibson advised Fiorella and Katherine that Shades Ridge would be a "good deal for tax reasons." Grace Tortomasi took no part either in the discussions prior to the formation of Shades Ridge or in the actual formation of the corporation.

During the period from the formation of Shades Ridge in 1957 through 1967, Katherine held the title of President of Shades Ridge, but was not substantially involved in its business activities particularly decision making. In her 1967 testimony, Katherine stated that she did write some checks on behalf of Shades Ridge during this period, but she could not at that time remember the particular purpose of any such checks. In her

1967 testimony, Katherine could not recall what her duties as President of Shades Ridge were during this period other than writing checks, nor could she recall whether she received any dividends or other distributions from Shades Ridge. In her 1967 testimony, Katherine could not specifically remember the last transaction in which she participated on behalf of Shades Ridge or the last check she wrote on behalf of Shades Ridge. In her 1967 testimony, Katherine could not recall any specific expenditures that she had made on behalf of Shades Ridge, or any specific deposits she had made to any bank account of Shades Ridge. In her 1967 testimony, Katherine did not know whether Shades Ridge was still in existence at the time of such testimony. In her 1967 testimony, Katherine could not recall whether Grace Tortomasi, the Secretary/Treasurer of Shades Ridge, or Melina Fiorella, Fiorella's mother and the Vice-President of Shades Ridge, had any duties with respect to Shades Ridge.

The only "business office" of Shades Ridge during this period was the law office of Gibson. There were no formal shareholder meetings during this period, only informal meetings with Gibson. In her 1967 testimony, Katherine could not recall who attended these meetings or how often the meetings were held. Katherine could not recall, in her testimony in 1967, whether any rent was paid to Shades Ridge with respect to the Kid McCoy farm. In her 1967 testimony, Katherine could not recall whether she or Fiorella paid any rent to Shades Ridge for their use of the Pizitz property as their residence or whether Shades Ridge paid the real estate taxes on this property.

From the incorporation of Shades Ridge through the date of the trial, Grace Tortomasi never attended any meetings in connection with Shades Ridge, never received a salary from Shades Ridge, never received a dividend from Shades Ridge, never borrowed money from Shades Ridge, and never saw

the books and records of Shades Ridge. She knows nothing about Shades Ridge except that at some time she owned one share of its stock.

Shades Ridge received approximately $200-300 per month in rental income from Avondale property during this period. Fiorella received payments from Shades Ridge on at least two occasions during this period: $2,500 on December 7, 1957, and $1,500 on May 30, 1959. Many friends of Fiorella and Katherine stayed at the Kid McCoy property during this period without paying rent to Shades Ridge. Fiorella continued to use the Kid McCoy property for his gambling activities from 1957 to 1968.

In 1964 nd 1965, the United States filed two lawsuits (which were ultimately consolidated) against Fiorella, Shades Ridge and members of Fiorella's family. In these lawsuits, the United States sought judgments against Fiorella for his unpaid federal tax liability, and collection of such judgments from the assets of Shades Ridge and Fiorella's family members. Pete Thomas assisted the attorney for Fiorella and Shades Ridge, Winston McCall, in connection with the lawsuits filed by the United States. The lawsuits filed by the United States were settled, and a Final Judgment was entered on January 3, 1968. The Final Judgment granted the United States the judgments it sought against Fiorella, dismissed the lawsuits with prejudice and released the liens of the United States on certain property owned by Shades Ridge and members of Fiorella's family at the time of the settlement.

On August 13, 1968, Pete Thomas transmitted to Katherine, in her capacity as President of Shades Ridge, financial statements that he had prepared as the result of his audit of the records of Shades Ridge for the period January 1, 1959, through July 31, 1968. The audit was done by Pete Thomas in connection with the settlement of the lawsuits described

above. In connection with his audit, Pete Thomas went to the Fiorella's residence in 1968 to establish what Shades Ridge owned. Fiorella was not at home, but Katherine was present. In Pete Thomas' presence, Katherine produced paper sacks filled with currency bound with rubber bands which she described as being her money. The currency was composed of "normal" looking bills; that is, the bills were not new in appearance. The bills were in demoninations of $50, $100, $500 and $1,000, and Pete Thomas recalls seeing several $500 and $1,000 bills. Katherine counted the currency in Pete Thomas' presence, and it totalled $430,000. Katherine said this money belonged to her and that she had saved it over the years. The $430,000 in currency was deposited into the Shades Ridge. $115,000 of this currency was the same $115,000 paid to the United States in the settlement discussed above. Pete Thomas accounted for the $430,000 in currency by recording it on the financial records of Shades Ridge as a note payable to Katherine ($400,000) and as paid-in-surplus ($30,000). Pete Thomas also recorded the "accumulation" of the $430,000 as stated to him by Katherine.

Pete Thomas instructed both Fiorella and Katherine that when either took any money out of Shades Ridge he or she should let Pete Thomas know the purpose of the withdrawal so that an entry could be made in the corporation's books. Shades Ridge had small amounts of income (recorded as sales) and expenses for each year from 1959 through July 31, 1968. In 1962, the Avondale property was transferred back into Katherine's name, and the "paid in surplus" account of Shades Ridge was reduced accordingly. In 1966, Shades Ridge paid a fine and attorney's fees incurred by Fiorella in connection with a criminal conviction for a gambling violation. Over the years, the attorneys fees of Shades Ridge were paid to various attorneys without regard to the fact that Fiorello did not want them paid. The $115,000 paid by Fiorella for his individual tax

liability pursuant to the 1968 Final Judgment was paid from the $430,000 currency produced by Katherine and was recorded on the books as a payment by Shades Ridge. Fiorella brought this $115,000 to Pete Thomas in the form of currency. Additional currency used by Shades Ridge was brought to Pete Thomas by either Fiorella or Katherine or he went by Katherine's house and picked up cash from her (although Pete Thomas could recall only one occasion when Katherine gave additional currency to him for Shades Ridge). Shades Ridge paid some living expenses and real estate taxes of Fiorella and Katherine during this period.

It is possible that many of the deposit slips to the Pete Thomas office account introduced as exhibits in the trial did not have anything at all to do with the Fiorella family of Shades Ridge. Pete Thomas did not pay any bills for Shades Ridge or the Fiorella family out of the Pete Thomas office account that were not reimbursed by Shades Ridge.

## Operation of Shades Ridge: 1968 through 1976

After the settlement with the United States resulting in the 1968 Final Judgment, Fiorella, Katherine and Pete Thomas all believed that Shades Ridge and Katherine had been released from and could no longer be held liable for Fiorella's tax liability reflected in that judgment, and Fiorella and Katherine were advised by their attorney that "they could operate the corporation like they had set out to do." In 1968, the stock ownership of Shades Ridge was changed. The new shareholders were Katherine, Samelia, Melina and Pete Thomas (as Katherine's nominee). In 1968, Fiorella was appointed Chairman of the Board of Shades Ridge, and Melina became Vice President. Katherine retained the title of President. Pete Thomas became Secretary of Shades Ridge in 1968.

During this period, Shades Ridge had its office on property leased and later owned by Shades Ridge on 29th Street, South in Birmingham. The office had four rooms. One room was used by Pete Thomas for his own accounting practice and for the business of Shades Ridge. Another room was the office of Shades Ridge used by Pete Thomas and Fiorella. Another room was a lounge. The fourth room was used by an unrelated corporation. Fiorella was present at the office during this period on a regular basis. He usually came to the office every day in the morning and stayed until noon. He departed from this routine by not appearing at the office three to five days per month. When Fiorella was at the office, he made many phone calls, talked to his friends, and drank in the lounge. Pete Thomas testified that he was not aware of any business Fiorella did in the office.

According to David Thomas, Katherine visited the office "seldom" during this period. According to Pete Thomas. Katherine visited the office once a week during periods in which she was not incapacitated by her alcohol and drug abuse problems. When Katherine was at the office, she stayed 30 to 40 minutes on the average. When she was at the office, she would look at bank statements, make small talk with Carol Harris (the secretary for Shades Ridge and for Pete Thomas) and ask where Fiorella was. Katherine did not make any phone calls during her visits to Shades Ridge. Katherine did not usually participate in the negotiation of loans to Shades Ridge. Neither Melina nor Samelia spent any significant duties for Shades Ridge during this period.

Carol Harris was employed as a secretary by Pete Thomas and by Shades Ridge. At Fiorella's request, Carol Harris compiled monthly statements of rental income for Fiorella's review. These monthly statements included properties titled to members of Fiorella's family as well as properties titled to

Shades Ridge. Carol Harris also opened the mail, prepared deposit tickets for checks payable to Shades Ridge, prepared checks for payment of Shades Ridge's bills, typed and handled any routine paperwork.

Fiorella participated in all decisions regarding property transactions entered into by Shades Ridge, and he regularly attended meetings regarding corporate decisions made by the corporation. Fiorella obtained as many opinions as possible regarding decisions by Shades Ridge to buy property. Fiorella signed most of the checks payable by Shades Ridge during this period. Fiorella participated in the negotiation of loans to Shades Ridge. During this period, Fiorella directed that a memorandum be prepared chastising the "employees, relatives and borrowers" of Shades Ridge regarding their work habits.

Pete Thomas testified that Fiorella was the "active manager of Shades Ridge property." On most occasions, persons who were interested in entering into property transactions with Shades Ridge telephoned Fiorella or Pete Thomas at the Shades Ridge office. Pete Thomas testified that he visited Katherine "once every couple of weeks depending upon how her condition was" concerning the operation of Shades Ridge. Pete Thomas also testified that he visited Katherine no less than twice a week to present checks and deeds for her signature and to allow her to look over the bank records of Shades Ridge. Pete Thomas' duties included various accounting functions. He paid rent and repair expenses of the corporation on his own authority. Pete Thomas did not, however, enter into real property transactions or borrow money on behalf of Shades Ridge on his own authority; rather, he received directions from both Fiorella and Katherine. Pete Thomas believed Fiorella to be the "boss" in spirit of Shades Ridge,

while Katherine was the boss only in terms of "legalities."[2] Pete Thomas testified that Fiorella "did not want the control of [Shades Ridge] to be beyond the grasp."

Fiorella used the Kid McCoy farm titled to Shades Ridge for his gambling operations throughout this period , with the exception of those times during which the gambling operations were shut down after raids by law enforcement authorities. Some of Fiorella's gambling income during this period was generated on the Kid McCoy farm. The Kid McCoy farm had a reputation as a gambling house during this period. Fiorella may have paid sparse rent to Shades Ridge during this time for his use of the Kid McCoy farm as a gambling house. Pete Thomas viewed Fiorella and Shades Ridge as "partners" in the gambling business because Fiorella earned his gambling income on Shades Ridge property. Shades Ridge gave Fiorella money to pay his criminal fines during this period.

Pete Thomas prepared Shades Ridge's tax returns, financial statements and work papers during this period. During Shades Ridge's August 1, 1968 through July 31, 1969 fiscal year, more than one third of Shades Ridge's income was "other income" ($10,000 "other income" out of total income of $27,385.65). This "other income" came into the corporation in the form of currency delivered to Thomas by Fiorella, or Katherine or picked up by Thomas from Katherine.

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[2]While Thomas suggested that Katherine may have had the "final say" on some of the decisions of Shades Ridge, he based this primarily on her formal title. To the extent he may have suggested that she substantially exerted and asserted her authority as opposed to Fiorella, the court does not find his testimony to be credible. In addition to consulting Fiorella for advice as to various matters, Katherine also consulted Charles Denaburg, Ferris Richey and Pete Thomas among others. In any event, Fiorella put Katherine in the position of exercising or asserting whatever authority she did assert based on her legal position. At times, Fiorella regretted that he had giver her "legal" control.

During Shades Ridge's fiscal year ending July 31, 1969, Fiorella was paid a salary of $12,000. No one else was paid a salary by Shades Ridge during that fiscal year. During Shades Ridge's fiscal year ending July 31, 1969, Shades Ridge borrowed $13,00 from Fiorella and paid back $13,000 to Fiorella.

During Shades Ridge's August 1, 1969 through July 31, 1970 fiscal year, more than 65% of Shades Ridge's income was "other income" ($29,547,56 "other income" out of total income of $45,102,55). This "other income," except a "relatively minor" portion, came into Shades Ridge in the form of currency delivered to Thomas by Fiorella or Katherine or picked up by Thomas from Katherine. On a handwritten work paper prepared by Pete Thomas, "other income" for the fiscal year ending June 30, 1970, is listed as $75,911.14, or 83% of total income for that period of $91,695.93.

During Shades Ridge's fiscal year ending July 31, 1970, Fiorella was paid a salary of $12,000. No one else was paid a salary during that fiscal year.

During Shades Ridge's fiscal year ending July 31, 1970, there were numerous cash transactions between Fiorella (and his family) and Shades Ridge. During its fiscal year ending July 31, 1971, Shades Ridge paid salaries totalling $79,289.00, most of which was paid to Fiorella and members of his family. During Shades Ridge's fiscal year ending July 31, 1971 there were numerous cash transactions between Fiorella (and his family) and Shades Ridge. During its fiscal year ending July 31, 1971, Shades Ridge loaned $50,000 to Maurice Dotson, a "very, very dear friend" of Fiorella's whole family and of Pete Thomas, without taking a mortgage.

During Shades Ridge's August 1, 1971 thrugh July 31, 1972 fiscal year, more than 50% of Shades Ridge's income was "other income" ($70,899.67 "other income" out of total in-

come of $138,308.21), most of which (at least $50,000 to $60,000) came into Shades Ridge in the form of currency delivered by Fiorella or Katherine or picked up by Thomas from Katherine. During Shades Ridge's fiscal year ending July 31, 1972, salaries in the amount of $52,019.39 were paid to Fiorella and his family. During Shades Ridge's fiscal year ending July 31, 1972, there were numerous cash transactions between Fiorella and his family and Shades Ridge.

During Shades Ridge's August 1, 1972 through July 31, 1973 fiscal year, nearly one-half of Shades Ridge's income was "other income" ($63,227,31 "other income" out of total income of $137,111.59), much (at least $33,000) of which came into Shades Ridge in the form of currency delivered by Fiorella or Katherine or picked up by Thomas from Katherine. During its fiscal year ending July 31, 1973, Shades Ridge disbursed $21,189.20 in cash to Fiorella, $10,000.52 to Katherine, $14,081.93 to Melina, and $6,461.00 to Samelia. Pete Thomas assumed that the "other income" coming into Shades Ridge from Fiorella in the form of currency was gambling income earned on the McCoy place.

In 1971 and 1974, Shades Ridge paid property taxes on property titled to members of Fiorella's family and the Melina Fiorella Trust. (Appendix I). Shades Ridge also paid property taxes on a residence titled to Docart Investment Company, a corporation owned by Nell Brom, Fiorella's girlfriend. Shades Ridge paid the taxes on this residence because "Sam [Fiorella] stayed at Nell's house a good bit of the time."

The Pete Thomas Office Account was a checking account created in 1970 by Pete Thomas to pay bills for himself and for his clients. Carrol Harris prepared checks on the account, and presented them to Pete Thomas for his signature. On occasion, the Pete Thomas Office Account was used to pay the personal expenses of Shades Ridge, Fiorella, Katherine,

Melina Samelia, Hugh Davis, and David Thomas. Shades Ridge sometimes reimbursed the Pete Thomas Office Account for its expenses and for personal expenditures made from the Pete Thomas Office Account on behalf of Fiorella and his members of his family.

Substantial amounts of currency were deposited into the Pete Thomas Account in 1970 through 1974.

| Date | Amount |
|---|---|
| 03-26-70 | $ 1,000.00 |
| 04-01-70 | 18,500.00 |
| 04-07-70 | 17,165.00 |
| 04-14-70 | 5,640.00 |
| 07-30-70 | 1,000.00 |
| 07-30-70 | 2,300.00 |
| 08-13-70 | 1,500.00 |
| 02-04-71 | 2,500.00 |
| 03-09-71 | 2,900.00 |
| 04-13-71 | 2,800.00 |
| 04-13-71 | 6,500.00 |
| 06-25-71 | 1,500.00 |
| 06-29-71 | 1,419.00 |
| 07-07-71 | 4,000.00 |
| 07-12-71 | 1,000.00 |
| 09-07-71 | 4,000.00 |
| 09-21-71 | 1,000.00 |
| 09-28-71 | 1,600.00 |
| 10-28-71 | 1,000.00 |
| 11-18-71 | 2,000.00 |
| 01-11-72 | 2,000.00 |
| 01-19-72 | 500.00 |
| 01-21-72 | 2,000.00 |
| 01-24-72 | 1,490.00 |
| 02-04-72 | 5,000.00 |

| | |
|---|---|
| 02-28-72 | 5,816.00 |
| 04–15-72 | 3,928.00 |
| 05-11-72 | 8,000.00 |
| 05-15-72 | 5,000.00 |
| 11-08-72 | 54,800.00 |
| 04-20-73 | 3,020.00 |
| 05-07-73 | 5,875.00 |
| 11-15-73 | 10,300.00 |
| 11-19-73 | 4,600.00 |

Some of the currency deposits to the Pete Thomas Office Account were primarily from properties belonging to and from Shades Ridge, Fiorella, Katherine, Melina, and Samelia, and "on very rare instances" at least some of the deposits are attributable to gambling debts.

Pete Thomas had ten or fifteen "regular" clients at this time other than Shades Ridge, few, if any, of whom generally paid him in cash. Shades Ridge and Fiorella were the only clients with whom Pete Thomas dealt on a day to day basis. Any deposit slips for the Pete Thomas Office Account representing payments to Pete Thomas by his clients other than Shades Ridge bore the clients' names. The Pete Thomas Office Account was used for deposits of money owing to Shades Ridge, or members of Fiorella's family.

Shades Ridge maintained a checking account at all times during this period. The Shades Ridge checking account was used to pay expenses of Fiorella and members of his family as follows:

a. (i) Federal and state taxes;
   (ii) Utility bills for the Kid McCoy farm;
   (iii) Country club membership;
   (iv) Utility bills for apartment;
   (v) Decoration of apartment.

b. Katherine:
   (i) Federal and state taxes;
   (ii) Utility bills for Forrestdale house;
   (iii) Utility bills for Pell City property;
   (iv) Utility bills for apartment;
   (v) Decoration of apartment.

c. Melina:
   (i) Federal and state taxes;
   (ii) Utility bill for "Boo's house;"
   (iii) Utility bills for Pell City property;
   (iv) Utility bills for Pembrooke Lane property;
   (v) Utility bills for Fungo Hollow property;
   (vi) Utility bills for Overlook property;
   (vii) Utility bills for Lay Lake property
   (viii) Construction for Lay Lake property;
   (ix) Insurance policy premium.

d. Samelia:
   (i) Federal and state taxes;
   (ii) Utility bills for Pell City property;
   (iii) Utility bills for Lay Lake property;
   (iv) Construction for Lay Lake property;
   (v) Insurance policy premium.

e. Grace Tortomasi: insurance policy premium.

f. David Thomas: federal and state taxes;

g. Hugh Davis: federal and state taxes.

h. T.Y. Gustin (Fiorella's associate in gambling operations at Kid McCoy farm): utility bills at Kid McCoy farm.

There were deposits of currency to the Shades Ridge account. There were interaccount transfers between the Shades Ridge account and the Pete Thomas Office account. The Shades Ridge account was used to pay "salaries" to Fiorella

and his family. Fiorella delivered cash to Pete Thomas to deposit both to the Pete Thomas Office account and to the Shades Ridge checking account. Fiorella kept no record of how much currency he delivered to Pete Thomas for deposit.

During this period, A. Lamar Reid gambled at the Kid McCoy property owned by Shades Ridge and lost $4,000 to Fiorella. Reid paid this gambling debt by transferring 4000 shares of Jefferson National Equities Corporation to Shades Ridge. During this period. Shades Ridge bought numerous parcels of property, including the following parcels: the Highway 150 property, the Highway 280 property, the Anniston liquor store, the 29th Street South Building (the site of the office of Shades Ridge), the 15th Avenue South building, and the Pell City property. Generally, Pete Thomas handled the negotiations with respect to the purchases of such property, although Fiorella and Katherine also participated in negotiations. Fiorella participated in the negotiations for the purchases of the Anniston liquor store from Willie Lloyd and of the Highway 150 property from Von Arthur.

During this latter period, pieces of property were purchased and/or sold by members of Fiorella's family with payments in connection with such transactions actually being made to or from the Shades Ridge account or the Pete Thomas Office Account:

a. Melina sold a parcel of property located at Fungo Hollow on April 16, 1970 to Jack Caddell. (Appendix I, item 6.) Melina took a mortgage on the property from Caddell, and payments on the mortgage were deposited into the Pete Thomas Office Account.

b. The Joyce property (also known as the Chelsea property) was sold by Melina to W.K. Inc., in two installments in December 1973. (Appendix I, Item 8.) The payments by W.K., Inc. were made by checks in the amounts of $22,500

and $30,000, both of which were deposited into the Shades Ridge account.

c. The Overlook property was conveyed to Melina by Fletcher Jones in December 1969 (Appendix I, Item 9) in part to satisfy a gambling debt incurred by Jones at the Kid McCoy farm. This property was originally to be sold to Shades Ridge but then title was put in Melina's name. Payments on the assumed mortgage were made from the Pete Thomas Office account. Fiorella and Katherine lived on the property for two or three years. The Overlook property was conveyed from Melina to Overlook Investment Company on March 5, 1973. (Appendix I, Item 9). Three days later, on March 8, 1973, $15,000 was deposited to the Shades Ridge account with the notation "Overlook Investment Company."

d. The Bessemer property was purchased by Melina and Charles Tortomasi on April 3, 1970. Both assumed a mortgage at the time of purchase. Pete Thomas did not recall Melina doing anything with respect to this purchase except signing the deed. Melina's payments on the mortgage were made by checks drawn on the Pete Thomas Office account. Melina and Charles Tortomasi subsequently sold the Bessemer property in two parcels, one to Marvin Ingels and the other to Mazer Lumber Supply Co. The sale proceeds and mortgage payments to Melina from Mazer were deposited to the Pete Thomas Office account and then transferred to the Shades Ridge account.

Fiorella participated in the negotiations for his daughters' purchase of the Fungo Hollow property from the Mizerany brothers, in the negotiations for Melina's purchase of the Overlook property from Fletcher Jones; and suggested to Katherine, Melina, and Samelia the purchase of and was otherwise concerned with the Pell City property. (Appendix I, Item 11). Fiorella resigned as Chairman of the Board of Shades Ridge on December 3, 1975.

## Operation of Shades Ridge: 1977 - Present

Katherine willed her shares of Shades Ridge to Melina and Samelia at her death in 1977. Since that time, Melina and Samelia have been the sole shareholders of Shades Ridge. Melina was President of Shades Ridge for a year and then in 1979 Samelia was to have a "turn" as President but Rowe Thomas became President instead. During the time, Fiorella was serving his sentence for federal tax evasion, David Thomas, Fiorella's son-in-law, was President of Shades Ridge, and he has remained President since that time. While Fiorella was in prison, David Thomas communicated with Fiorella once each day. David Thomas testified that one of every ten such conversations dealt with the business of Shades Ridge, such as obtaining advice as to what Shades Ridge should do with its real property in terms of sales or leases as well as maintenance.

During this period, the "business office" of Shades Ridge has been the residence of David and Samelia Thomas. During this period, corporate meetings have been held in the form of family dinners attended by David Thomas, Samelia, Melina, and Hugh Davis (before his divorce from Melina). Fiorella has occasionally attended the dinners since his release from prision. No formal minutes or notes of the meetings are kept, nor are announcements of the meetings made. Currently, either Samelia or Melina sign checks on behalf of Shades Ridge. David Thomas does not have check signing authority.

Since 1977, all the income of Shades Ridge has come from the rental of real property, except that Shades Ridge realized approximately $200,000 from the settlement of litigation arising from a development project (the Vestavia Park Apartments), and Shades Ridge sold a parcel of real property in Pell City. Upon the advice of Abe Berkowitz, and attorney, approximately $108,000 of the Vestavia Park Apartments settlement pro-

ceeds received by Shades Ridge was paid to Fiorella in a series of $9,000 payments. These payments were not reported on the tax returns of Shades Ridge or reported by Shades Ridge to the Internal Revenue Service in any way. The Vestavia Park Apartments were developed by Shades Ridge without regard to the fact that Fiorella did not want the corporation to do it.

The only real property currently owned by Shades Ridge is the Kid McCoy Farm, the Highway 150 property, and the Anniston liquor store. Fiorella has lived on the Kid McCoy farm since his release from prison at an annual rent of $5,000 pursuant to a 20 year lease entered into when Fiorella was released from prison. Such rent has been paid in one annual cash lump sum during the last two or three years from Fiorella's gambling income. The tenants on the Highway 150 property and the Anniston liquor store pay monthly rent to Shades Ridge by mail.

Since 1977, Shades Ridge has had no significant regular employees. During this period, the only books and records maintained by Shades Ridge are its bank account deposit stubs, cancelled checks and monthly statements. Shades Ridge is essentially a passive real estate holding company, having no active business function. The only real estate transaction that Shades Ridge has had since 1977 was to sell a parcel of real property in Pell City. Shades Ridge has had a few lease negotiations since 1977, but it has not entered into any leases since 1982. In September 1982, David "Rowe" Thomas hired William Parsons to do the accounting work for Shades Ridge. Parsons has never consulted with Sam Fiorella regarding the work he has done for Shades Ridge.

Melina does not usually take a salary from Shades Ridge, but she has taken a salary when "they are short somewhere else," that is, when she cannot get money out of other properties titled in her name. David Thomas and Samelia draw

a combined salary from Shades Ridge of between $300 and $600 per week. According to David Thomas, "it's in her [Samelia's] name." Samelia's duties with respect to the corporation are to sign checks and to answer the telephone. Samelia takes telephone calls for any complaints which might arise from the tenants of the three parcels of property, one of whom is her father. The complaints typically concern air conditioning or heating problems. Such duties take a very little amount of time.

David Thomas testified that the Kid McCoy farm is worth more than the $5,000 per year in rent that Fiorella pays, but that Melina and Samelia just "wanted him to have a place and they didn't really care if he [Fiorella] paid rent" to Shades Ridge. Fiorella does not believe that he will be evicted if he fails to pay rent on the Kid McCoy farm. Fiorella has on occasion conducted gambling operations at the Kid McCoy farm during this period and was raided at the Kid McCoy farm in 1981. The 1981 raid led to Fiorella's conviction on gambling charges in 1983.

Fiorella is listed as an employee for the Blue/Cross/Blue Shield health insurance plan of Shades Ridge as well a three other family members who are not employed by the corporation, and a couple of other individuals not employed by the corporation. Fiorella participated on behalf of his daughters and Shades Ridge in negotiations with potential purchasers or leasees of the Highway 150 property, including Montclair Associates in 1980, and the Galleria developers in 1979 and 1980.

In 1981, Shades Ridge borrowed $30,000 from W.C. Lloyd, a lifelong friend of Fiorella, to remodel the Highway 150 property for its lease to Tommy Resha, a long time gambling associate of Fiorella, and his wife, Phillis Resha. Resha leased the Highway 150 property from Shades Ridge for his

restaurant, Harpoon Louie's. Subsequently, Melina and Samelia decided that Fiorella should become involved in a "legitimate" business. Toward this end, Shades Ridge borrowed an additional $35,000 from Lloyd to buy out Resha's lease and to buy the restaurant business for Fiorella.

Fiorella decided to go into the restaurant business by operating Captain Hook's Restaurant with George Salem on the Highway 150 property. Because David Thomas, Fiorella, and Salem were all convicted felons and therefore unable to obtain a liquor license, the lease was made between Shades Ridge and Salem's wife. Fiorella and the Salems had a dispute with respect to the restaurant business, which culminated in litigation. The lawsuit was settled on the basis that Mrs. Salem's lease was enforced and Fiorella was ousted from the business.

**The Melina Fiorella Trust**

The Melina Fiorella Trust was created on March 6, 1973 by Fiorella's mother as Settlor and Fiorella as Trustee. The beneficiaries of the Trust have at all times been Melina and Samelia. The corpus of the Trust is real property located on old Highway 31 and upon which a service station and car wash are located. The property which constitutes the corpus of the Trust was purchased in the name of Fiorella's mother in 1957. Fiorella accompanied her to a lawyer's office when the property was purchased. The rent paid to the Trust is sent to a post office box, where David Thomas picks up the rent check. There is no other business activity of the Trust. Shades Ridge has borrowed money from the Trust and loaned money to the Trust. Fiorella and Samelia have signatory authority over the Trust checking account. The Trust owns a Cadillac automobile, which is driven by Fiorella and his girlfriend, Nell Brom. The car was bought for Fiorella, who actually went to the dealer-

ship and selected the car. In the early 1980's, the Trust paid Fiorella's hospital expenses and the deposit for new telephone service for Fiorella. Fiorella has borrowed money from the Trust. Fiorella has no duties as Trustee. Fiorella testified that he thought that his attorney fees in connection with this litigation were borrowed from the Trust. Grace Tortomasi does not know of any trust established by Melina Fiorella for the children of Grace and Joe Tortomasi, also her grandchildren.

### Property Transactions

Property transactions pertinent to the lawsuit are set forth in Appendix I.

## CONCLUSIONS OF LAW

### Nominee or Alter Ego

The Supreme Court of the United States has recognized that the property of a nominee or alter ego of a taxpayer is subject to the collection of the taxpayer's tax liability. *G.M. Leasing Corp. v United States;* 429 U.S. 338, 350-51 (1977). Fiorella and Shades Ridge have recognized this principle in their brief and argue that the essential test is one of control.[3]

The federal standards, and likely the Alabama standards, applicable to such a consideration are stated in *Valley Finance, Inc. v. United States,* 629 F.2d 162, as follows:

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[3]Fiorella and Shades Ridge also assert that the test is basically the same whether the law applied is federal law or Alabama law. *Cf. United States v. Jon T. Chemicals, Inc.,* 768 F.2d 686 (5th Cir. 1985). *See* note 6 at page 690. See, however, *Loving Savior, infra,* which suggests that state law is applicable. This court concludes, as do Fiorella and Shades Ridge, that whichever law is applicable makes no difference under the facts of this case. *See* Keys 4-6 of *Woods v. Commercial Contractors, Inc.,* 384 So. 2d 1026, 1029 (Ala. 1980) for applicable Alabama law.

The concept of distinct corporate entity has long served useful business purposes, encouraging risktaking by individual investors as well as overall convenience of financial administration. *See generally Moline Properties, Inc. v. Commissioner of Internal Revenue*, 319 U.S. 436, 63 S. Ct. 1132, 87 L. Ed. 1499 (1943). Ordinarily, such considerations justify treating the corporation as a separate entity, independent of its owner. *Quinn v. Butz*, 510 F.2d 743, 757 (D.C. Cir. 1975). On occasion, however, this concept is abused, and yields results contrary to the interests of equity or justice. Courts have not hesitated to ignore the fiction of separateness and approve a piercing of the corporate veil when the corporate device frustrates clear intendment of the law. *Id.* at 757-58 (citing cases). The Government's inability otherwise to satisfy legitimate tax debts clearly may form a sound basis for such disregard of corporate form. *See e.g., Avco Delta Corp. Canada Ltd. v. United States*, 540 F.2d 258, 264 (7th Cir.), *cert. denied*, 429 U.S. 1040, 97 S. Ct. 739, 50 L. Ed. 2d 752 (1976); *G.M. Leasing Corp. v. United States*, 514 F.2d 935 (10thf Cir. 1975), *rev'd in part on other grounds*, 429 U.S. 338, 97 S. Ct. 619, 50 L.Ed.2d 530 (1977).

Given the diversity of corporate structures and the range of factual settings in which unjust or inequitable results are alleged, it is not surprising that no uniform standard exists for determining whether a corporation is simply the alter ego of its owners. The fact of sole ownership is not by itself sufficient, although it is certainly not irrelevant. Evidence of plain fraud is similarly of probative value, though not a prerequisit. *DeWitt Truck Brokers, Inc. v. W. Ray Fleming Fruit Co.*, 540 F.2d 681, 684 (4th Cir. 1976). We have previously suggested that the court may ignore existence of the corporate *form whenever an*

> *individual so dominates his organization "as in reality to negate its separate personality." Quinn v. Butz, supra,* 510 F.2d at 758. *Obviously, control by the individual must be active and substantial, but it need not be exclusive in a hypertechnical or day-to-day sense.* The test is a practical one, based largely on a reading of the particular factual circumstances. As a fact issue, its ultimate determination is dependent upon the sound discretion of the trial judge in his appraisal of the evidence. His resolution will be left undisturbed on appeal unless clearly erroneous.

(Emphasis added).

In *Loving Saviour Church v. United States,* 728 F.2d 1085, 1086 (8th Cir. 1984), the court considered the following factors and evidence as supporting lthe trial court's conclusions as to both alter ego and fraudulent conveyance theories:

> Second, the district court found that the Loving Saviour Church was the alter ego of the Andersons. In so finding the court considered the following factors: 1) *the Andersons treated church assets as their own in that their residence, business and farmland comprised the church property;* 2) Dr. Anderson carried insurance on church assets in his own name; 3) *there were few internal controls in the church — Dr. Anderson was the minister and a trustee along with his wife, daughter, and sister-in-law; 4) church fund were used to pay personal expenses; 5) there was a close family relationship between the church officers and the taxpayer/founder; 6) the Anderson transferred property to the church for little or no consideration; 7) a car which was in the church's name bore the personalized license "Myrtle"; 8) the Andersons are fully supported by the funds and property of the Loving Saviour Church in whatever style they themselves choose.*

(Emphasis added).

Fiorella and Shades Ridge have suggested that "the United States must prove by a preponderance of the evidence that Fiorella actively and substantially controlled and dominated the corporation and he thereby conducted its business in such a manner as to make it a mere instrumentality of its own."

The court concludes that whether Alabama law, federal law as suggested by *Valley Finance*, of the general statement of Fiorella and Shades Ridge in their brief is applied, Shades Ridge was, at all pertinent times, and is the nominee, instrumentality or alter ego of Fiorella.[4] Among other facts stated more particularly above, the court has considered and weighed the following general facts:

1. The only source of any significant assets, including $430,000.00 in sacked up cash, for Shades Ridge has been Fiorella's gambling activities.

2. While Shades Ridge has relatively prospered, Fiorella owns little besides the clothes on his back, although he has "earned" substantial income over the years.

3. The scheme began at least as early as the acquiring of the Kid McCoy property in 1953 in the names of Tortomasi and Thomasino and its subsequent transfer to Shades Ridge. Tortomasi and Thomasino were both apparent nominees of Fiorella.

4. There is no credible evidence that Fiorella's wife had the capacity, ability or the inclination to accumulate a large sums of money or property or to operate a business such as that

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[4] *See also* factors considered in *Loving Saviour*. *See also Quinn v. Butz*, 510 F.2d 743 (D.C. Cir. 1975); *Laboche Coal c. Black*, 672 F.2d 92 (D.C. Cir. 1982) and *Krivo Industrial Sup. Co. v. National Dist. & Chem. Corp.*, 483 F.2d 1098 (5th Cir. 1973) (citing, *inter alia*, Alabama Law).

of Shades Ridge. The court finds that Fiorella, not his wife, accumulated the $430,000.00. The same is true of Fiorella's daughters and in-laws. As part of the scheme, two parcels of property were already in his wife's name at time of the formation of Shades Ridge, in addition to at least a 1/4 interest in the Kid McCoy property. His wife had very little knowledge or memory of various business decisions.

5. Fiorella was ever present and ever involved in Shades Ridge's activities.

6. Fiorellla has used Shades Ridge property, rent free and has funnelled money in and out of it, including at least $430,000.00 in cash at one time which the court finds had been accumulated by Fiorella, not his wife.

7. Fiorella was continuously involved in the business decisions of Shades Ridge and moved his family members in and out of control at will. He has substantially "bankrolled" Shades Ridge while retaining very little except cash in his pocket and the clothes on his back. He doesn't even own his automobile which is owned by another mysteriously funded trust.

8. The nature of the use of the Kid McCoy property did not change, regardless of ownership and Fiorella used it for no rent or below market rent.

9. There is *no* family member, other than Fiorella, who truly controlled Shades Ridge at any time. Pete Thomas was merely an extension of Fiorella's control.

10. The Shades Ridge and Thomas bank accounts were utilized for Fiorella's benefit to the extent he deemed appropriate.

The court will not repeat its other findings, all of which support the court's conclusion of this issue.

## Fraudulent Conveyance

This is an alternative theory and it is perhaps not necessary for the court to reach the issue. Many of the same facts which support a finding that Shades Ridge was and is the nominee, alter ego or instrumentality of Fiorella, also mandate the conclusion that the property of Shades Ridge was fraudulently conveyed to it.

The applicable law is stated in *United States v. Grice*, 567 F. Supp. 113 (M.D. Ala. 1983). *See also Smith v. Wilder*, 270 Ala. 637, 120 So. 2d 871 (1960). This court finds and concludes that the property which has been acquired by Shades Ridge has resulted from the actual fraud committed by Fiorella and Shades Ridge. The court concludes that all of Shades Ridges' property has resulted from the intent of these parties to defeat or delay the rights of the United States as a tax collector.[5] "No matter when federal taxes are in fact assessed, they are considered due and owing, thus constituting a liability, when the tax return is required to be filed." *Grice*, 567 F. Supp. at 115.

The facts which the court has found are also likely to support a finding of constructive fraud at least as to a portion of Shades Ridges' property. *See Smith v. Wilder* and *Cope v. Commissioner of Internal Revenue*, 781 F.2d 852 (11th Cir. 1986). Whether the United States is considered an existing creditor or a subsequent creditor, it is subject to injury as a result of the various actual fraudulent transfers to or acquirals

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[5]In other words, the court concludes that (1) the United States was a creditor to be defrauded; (2) Fiorella was a debtor intending to defraud; and (3) there were conveyances of property, or funds, directly or indirectly from Fiorella to Shades Ridge out of which the United States could have realized its claim or a portion thereof. *Roddam v. Martin*, 285 Ala. 619, 235 So. 2d 654 (1970).

with Fiorella's funds of Shades Ridge properties. The court concludes that the United States is entitled to relief under both its alter ego and fraudulent conveyance theories and that it is entitled to foreclose on the assets of Shades Ridge to satisfy its lien(s) and judgment(s) as to Fiorella's tax liability.

The United States will submit a proposed judgment in accordance herewith in ten days.

This 17 day of December, 1987.

/s/
ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

# APPENDIX I

## Property Transactions

1. Kid McCoy Farm (Shelby County):

   07-18-53: Franklin Howell Smith, et al. to Leon Thomasino and Joe Tortomasi (Ex. 16)

   01- ?-56: Leon Thomasino, et ux. to Sam Fiorella (Ex. 18)

   05-27-57: Sam Fiorella, et ux. to Shades Ridge Holding Co. (Ex. 4)

2. Highway 150 Property (Jefferson County):

   07-27-68: G.M. Arthur, et ux. to Shades Ridge Holding Co. (Ex. 20)

3. Anniston Liquor Store (Calhoun County):

   07-02-71: Lowell Tyson, et ux. to Shades Ridge Holding Co. (Ex. 15)

4. Fiorella Residence (Jefferson County):

   05-27-57: Katherine Fiorella and husband Sam Fiorella to Shades Ridge Holding Co. (Ex. 3)

5. Avondale Apartments (Jefferson County):

   09-16-55: Philip Randman, et al, to Katherine Fiorella (Ex. 85)

   5-27-57: Katherine Fiorella and Husband Sam Fiorella to Shades Ridge Holding Co. (Ex. 5)

6. Fungo Hollow Property (Shelby County):

   02-24-65: Viva Chumbler to Melina Fiorella [Davis], Norman Mizerany and Mike Mizerany (Ex. 92)

07-18-69: Mike Mizerany to Melina Davis (Ex. 95) and Norman Mizerany to Melinda Davis (Ex. 55)

04-08-70: Mike Mizerany to Melina Davis (Ex. 96), Norman Mizerany to Melina Davis (Ex. 97), Viva Chumbler to Melina Davis (Ex. 98) and Melia Fiorella to Melina Davis (Ex. 99)

04-16-70: Melina Davis and Husband Hugh Davis to Jack Caddell (Ex. 56, 101)

7. Melina Fiorella Trust Property (Shelby County):

04-26-66: Arminda Williams, et al. to Melina Fiorella (Ex. 93)

03--06-73: Melina Fiorella to Sam A. Fiorella, Trustee (Ex. 100)

8. Joyce Property (Shelby County):

06-21-69: Joe E. Snyder and wife to Mellina (sic) Davis (94)

12-04-73: Melina Davis and husband Hugh Davis to W.K., Inc. (Ex. 61)

9. Overlook Property (Jefferson County):

12-17-69: Fletcher Jones, et ux. to Melina Davis (Ex. 43)

03-05-73: Melina Davis and husband Hugh Davis to Overlook Investment Co. (Ex. 44)

10. 05-03-70: Mary Thomasino and husband Tony Thomasino to Charles Tortomasi and Melina Davis (Ex. 49)

11. Pell City Property (St. Clair County):

11-08-72: Edna Stone and husband to Katherine Fiorella, Samelia Thomas and Melina Davis (Ex. 102)

12. La Coosa Estates/Lay Lake (Shelby County):)

06-03-71: Charles H. Thomas and wife to Melina Davis amd Samelia Thomas (Ex. 66)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

| | | |
|---|---|---|
| SHADES RIDGE HOLDING CO., INC. | ) | |
| Plaintiff, | ) | |
| v. | ) | CIVIL ACTION NO: CV85-PT-2526-S |
| UNITED STATES OF AMERICA, | ) | |
| Defendant. | ) | |
| and | ) | |
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | |
| v. | ) | CIVIL ACTION NO: CV86-PT-1415-S |
| SAM A FIORELLA and SHADES RIDGE HOLDING COMPANY, INC., | ) | |
| Defendants. | ) | |

## ADDENDUM TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

After this court filed its most recent findings of fact and conclusions of law, it has had occasion to read *Messick v. Morring and Drane*, 21 ABR 4478 (Ala. 1987). Although it is implicit in the court's earlier findings, the court now more explicitly finds and concludes that

1. Fiorella effectively had complete control and domination of Shades Ridges finances, policy and business practices so that Shades Ridge had no separate "mind, will or existence of its own." Further, that Fiorella and Shades Ridge were guilty of fraud and the violation of a statutory duty and also that the court presumes (in addition to actually finding) misuse of control in order to prevent an injustice or inequitable circumstances. Further, that the harm or unjust loss complained of was proximately caused by the foregoing.

These findings are in addition and supplemental to previous findings and not in lieu thereof.

This the 29 day of December, 1987.

/s/
ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

| | | |
|---|---|---|
| SHADES RIDGE HOLDING CO., INC. | ) | |
| Plaintiff, | ) | |
| v. | ) | CIVIL ACTION NO: CV85-PT-2526-S |
| UNITED STATES OF AMERICA, | ) | |
| Defendant. | ) | |
| and | ) | |
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff, | ) | |
| v. | ) | CIVIL ACTION NO: CV86-PT-1415-S |
| SAM A FIORELLA and SHADES RIDGE HOLDING COMPANY, INC., | ) | |
| Defendants. | ) | |

## INTERLOCUTORY JUDGMENT

This cause having been heard after an evidentiary hearing on limited issues pursuant to Rule 42 of the Federal Rules of Civil Procedure,

It is hereby ORDERED, ADJUDGED and DECREED in accordance with the Findings of Fact and Conclusions of Law entered on November 18, 1986, that:

1. The Plea Bargaining Agreement dated April 16, 1976 between Sam A. Fiorella and the United States does not preclude the United States from asserting that Shades Ridge Holding Company, Inc. is the nominee of Sam A. Fiorella or the transferee of a fraudulent conveyance by Sam A. Fiorella. If Shades Ridge Holding Company, Inc. is found to be the nominee of Sam A. Fiorella or a fraudulent conveyance transferee of Sam A. Fiorella, said Plea Bargaining Agreement does not preclude the collection of any of Sam A. Fiorella's federal tax liability from any assets of Shades Ridge Holding Company, Inc.;

2. The Final Judgment entered on January 3, 1968, in *United States v. Fiorella,* Nos. 64-391 and 65-774 (N.D. Alabama)., is not res judicata with respect to the issue of whether Shades Ridge Holding Company, Inc. is, or was, the nominee of Sam A. Fiorella or the transferee of a fraudulent conveyance by Sam A. Fiorella. If Shades Ridge Holding Company, Inc. if found to be the nominee of Sam A. Fiorella or a fraudulent conveyance transferee of Sam A. Fiorella, said Final Judgment does not preclude the collection of any of Sam A. Fiorella's federal tax liability arising after the 1968 calendar tax year from any assets of Shades Ridge Holding Company, Inc. If Shades Ridge Holding Company, Inc. is found to be the nominee of Sam A. Fiorella or a fraudulent conveyance transferee of Sam A. Fiorella, said Final Judgment precludes the collection of Sam A. Fiorella's federal tax liability set forth in the Final Judgment from the "Kid McCoy" property, but does not preclude the collection of Sam A. Fiorella's federal tax liability set forth in the Final Judgment from any other assets of Shades Ridge Holding Company, Inc.

3. The statute of limitations on fraudulent conveyance actions under Alabama law does not preclude the United States from asserting a fraudulent conveyance theory in this action.

4. The United States shall recover from Sam A. Fiorella the sum of $590,539.11, plus statutory interest on said sum from and after January 11, 1983. Said sum of $590,539.11 is composed of assessed federal income tax, penalty and interest as follows:

| Year | Tax | Additions to Tax | Interest to Date of Assessment | Total |
|---|---|---|---|---|
| 1969 | $23,283.09 | $11,743.43 | $24,120.16 | $ 59,146.68 |
| 1970 | 50,557.84 | 25,318.30 | 49,342.02 | 125,218.16 |
| 1971 | 45,075.91 | 22,616.58 | 41,287.38 | 108,979.87 |
| 1972 | 64,318.90 | 32,194.94 | 55,053.89 | 151,567.73 |
| 1973 | 40,026.53 | 20,013.27 | 31,859.19 | 91,898.99 |
| 1974 | 17,762.01 | 9,509.44 | 11,872.55 | 39,144.00 |
| 1975 | 3,453.80 | 1,731.21 | 2,146.66 | 7,331.67 |
| 1976 | 3,476.00 | 1,738.00 | 2,038.01 | 7,252.01 |
| | | | | $590,539.11 |

5. The sole issue remaining for disposition is whether the United States may collect from the assets of Shades Ridge Holding Company, Inc. the unpaid federal tax liability of Sam A. Fiorella on a nominee theory and/or on a fraudulent conveyance theory. This issue is reserved and will be tried at a future date.

DONE and ORDERED this 6 day of January, 1987.

/s/ Robert B. Propst
ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

ENTERED
JAN 6 1987

FILED
JAN 6 1987
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
CHARLES T. OLIVER, CLERK

RECEIVED
JAN 7 1987

Supreme Court, U.S.
FILED
FEB 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1012

# In the Supreme Court of the United States

OCTOBER TERM, 1989

SAM A. FIORELLA AND SHADES RIDGE HOLDING COMPANY, INC., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
*Solicitor General*
SHIRLEY D. PETERSON
*Assistant Attorney General*
WILLIAM S. ESTABROOK
THOMAS R. LAMONS
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12 pp

## QUESTION PRESENTED

Whether federal tax liens securing a government tax claim that had been assessed and reduced to judgment were rendered unenforceable by an Alabama statute providing that a judgment cannot be revived after the lapse of 20 years.

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# In the Supreme Court of the United States

OCTOBER TERM, 1989

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No. 89-1012

SAM A. FIORELLA AND SHADES RIDGE HOLDING COMPANY, INC., PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-12a), including the additions made by the court in connection with its order denying rehearing (Pet. App. 1a-2a), is reported at 888 F.2d 725. The opinion of the district court (Pet. App. 26a-59a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on August 10, 1989. A petition for rehearing was denied on September 29, 1989 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on December 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner Fiorella engaged in the gambling business in the Birmingham, Alabama, area for at least 40 years (Pet. App. 28a). His gambling activities generated large amounts of unreported income, resulting in unpaid federal tax liabilities of more than $4 million, including penalties and interest (*id.* at 29a). Since the 1950's, Fiorella has frequently conducted financial transactions in cash; failed to keep records of account; failed to maintain bank accounts; and caused his property to be titled in the name of others, including petitioner Shades Ridge Holding Co. (*id.* at 29a-30a; see generally *id.* at 30a-53a).

Since 1964, the government has been engaged in litigation with petitioners to determine and collect Fiorella's tax liabilities. In 1964 and 1965, the government commenced two actions in the United States District Court for the District of Alabama seeking, *inter alia*, to reduce to judgment income and wagering tax assessments against Fiorella totalling more than $1 million (Pet. App. 13a-14a, 27a). Those actions were consolidated, and, on January 3, 1968, the district court entered judgment against Fiorella in the amount of $1,004,553 (*id.* at 27a).

The government commenced the instant proceeding against petitioners in 1986, seeking to foreclose upon its tax liens and judgment liens (including, *inter alia*, the assessments reduced to judgment in 1968) against all property titled to Shades Ridge, on the theory that it was the nominee or alter ego of Fiorella (Pet. App. 27a). After a trial, the district court entered extensive findings of fact and conclusions of law (*id.* at 26a-59a), finding that Shades Ridge was a nominee, instrumentality, and alter ego of Fiorella and therefore that Fiorella's tax liabilities could be collected from property titled to Shades Ridge. The district court subsequently entered a final judgment and decree of

foreclosure (*id.* at 17a-18a, 21a-25a). Petitioners filed a motion for relief from judgment on the ground that the liens were unenforceable because an Alabama statute provides that a judgment cannot be revived more than 20 years after it is entered, but the court denied the motion (*id.* at 19a-20a).[1]

2. The court of appeals affirmed (Pet. App. 3a-12a).[2] In response to petitioners' petition for rehearing, the court amended its opinion to discuss its affirmance of the district court's denial of petitioners' motion for relief from the judgment (*id.* at 1a-2a). The court explained (*id.* at 2a): "The district court did not err in denying Fiorella's motion. When an unpaid assessment is reduced to judgment, the tax lien is incorporated, but not merged, in the judgment. Since the tax lien survives the judgment, it can be enforced at any time."

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[1] While this case was pending in the district court, the government had commenced a separate action seeking to revive the judgment entered against Fiorella in 1968. The district court refused to revive the judgment, on the ground that Alabama Code § 6-9-190 (1975) provides that a judgment cannot be revived after the lapse of 20 years from its entry. See Pet. App. 13a. The court of appeals affirmed (869 F.2d 1425 (1989), *reprinted at* Pet. App. 13a-16a), holding that the Alabama statute "is not a statute of limitations and operates the same against the United States as it operates against private parties" (*id.* at 15a). In so ruling, the court of appeals expressly declined to consider whether the tax lien securing payment of the tax liabilities reduced to judgment in 1968 remained enforceable (*id.* at 16a).

[2] The government also sought to reduce to judgment additional assessments against Fiorella, totalling $590,539, which represented his unpaid federal income tax liabilities for 1969-1976 (Pet. App. 27a). The district court reduced those assessments to judgment and held that the government was entitled to collect that liability from property titled to Shades Ridge (*id.* at 27a, 53a-59a, 65a-67a). The court of appeals affirmed (*id.* at 7a-12a), and petitioners do not seek review of that aspect of the judgment below.

## ARGUMENT

The courts below correctly rejected petitioners' argument that federal tax liens arising from Fiorella's tax liabilities were rendered unenforceable by Alabama Code § 6-9-190 (1975). Petitioners do not allege that the decision below conflicts with any decision of this Court or of another court of appeals; indeed, petitioners acknowledge that the question presented here is one of "first impression" that "has not previously been addressed in any reported decision" (Pet. 10). Accordingly, there is no reason for review by this Court.

It is well established that, while state law defines whether a taxpayer has a property right to which a lien may attach, federal law determines the tax consequences and priorities of federal tax liens. See, *e.g.*, *United States* v. *National Bank of Commerce*, 472 U.S. 713, 722-723 (1985); *Aquilino* v. *United States*, 363 U.S. 509, 513-514 (1960); *United States* v. *Acri*, 348 U.S. 211, 213-214 (1955). " '[O]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative,' and the tax consequences thenceforth are dictated by federal law." *United States* v. *National Bank of Commerce*, 472 U.S. at 722 (brackets in original) (quoting *United States* v. *Bess*, 357 U.S. 51, 56-57 (1958)). Thus, as a general matter, state law limitations upon creditors do not affect the attachment of a federal tax lien or its enforcement. See also *United States* v. *Rodgers*, 461 U.S. 677, 701 (1983).

Section 6321 of the Internal Revenue Code[3] provides that a federal tax lien on the taxpayer's property arises upon the assessment of a federal tax liability. Section 6322 of the Code defines the duration of federal tax liens as follows:

> Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the

[3] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

> assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

Section 6502(a) of the Code provides that a properly assessed tax may be collected by levy or by a proceeding in court "but only if the levy is made or the proceeding begun—(1) within 6 years after the assessment of the tax; * * *." Petitioners' contention is that the final clause of Section 6322 operates to extinguish the federal tax lien at the time that state law would make a judgment arising out the same tax liabilities expire. This contention is mistaken. This clause of Section 6322 was not intended to import the vagaries of state law into the federal statute fixing the period of tax liens; rather, it refers to the limitation of Section 6502(a) of the Code. If no collection action is commenced within six years of assessment, the tax liability becomes "unenforceable by reason of lapse of time," and the tax lien is extinguished by operation of Section 6322. But if collection proceedings are commenced within the six-year period, the final phrase of Section 6322 is not implicated and the lien, unless otherwise discharged, remains in effect until the tax liability is satisfied.

It is apparent from the history of Section 6322 that the "unenforceable by reason of lapse of time" phrase was not intended to limit the life of tax liens by reason of state law limitations on the enforceability of judgments. This language was contained in Section 6322 before the provision had any reference to judgments. The parenthetical clause was added to Section 6322 in 1966; prior to that time, the statute provided that a lien shall continue in effect "until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time" (see 26 U.S.C. 6322 (1964)). The latter phrase plainly referred to the six-year period contained in Section 6502(a) for collection of

liabilities, and its meaning did not change with the addition in 1966 of the parenthetical phrase referring to judgments arising out of tax liabilities.[4]

As petitioners acknowledge (Pet. 10), the courts have recognized in a variety of contexts that, where an assessment is reduced to judgment, the accompanying lien is not merged into the judgment, but retains an independent existence. See, *e.g.*, *United States* v. *Overman*, 424 F.2d 1142, 1147 (9th Cir. 1970); *United States* v. *Hodes*, 355 F.2d 746, 748-749 (2d Cir. 1966), cert. dismissed, 386 U.S. 901 (1967); *Moyer* v. *Mathas*, 332 F. Supp. 357, 359 (M.D. Fla. 1971), aff'd, 458 F.2d 431, 433-434 (5th Cir. 1972); *United States* v. *Ettelson*, 67 F. Supp. 257, 259 (E.D. Wis. 1946), aff'd in relevant part, 159 F.2d 193, 196 (7th Cir. 1947). Thus, regardless of whether the judgment is enforceable, the lien itself can be enforced by judicial foreclosure, pursuant to Section 7403(a) of the Code, until the tax liability is satisfied. The operation of Section 6322 is cogently explained by a leading commentator (W. Plumb, *Federal Tax Liens* 50-51 (3d ed. 1972) (footnotes omitted)): "The commencement

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[4] In its later consideration of these provisions, Congress has indicated its understanding that Section 6322 extinguishes liens where the tax liability has become uncollectible because of the operation of Section 6502, not where a state statute would make a judgment unenforceable. In 1988, Congress amended Section 6502 to provide that commencing collection action within six years extends the period during which the tax liability may be collected by levy, as well as by enforcing the lien. See Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 1015(u), 102 Stat. 3573. The Conference Report explained the purpose of this amendment as follows (2 H.R. Conf. Rep. No. 1104, 100th Cong., 2d Sess. 5-6 (1988)):

> [T]he Senate amendment conforms the statute of limitations rule for levies to that for liens so that if a timely proceeding in court for the collection of tax is commenced, the period during which the tax may be collected by levy shall not expire as long as the tax is collectible.

of the suit tolls the statutory period, and the obtaining of a judgment will keep the time for collection open indefinitely, and will correspondingly extend the life of the lien. The Government need not perfect the lien of the judgment as the tax lien itself (with its original priority status) is preserved and may still be enforced by levy or by judicial foreclosure * * * ." See also M. Saltzman, *IRS Practice and Procedure* ¶ 14.18, at 14-93 (1981) (general tax "lien has an unlimited duration so long as collection action is begun within the six-year statutory period of collection").[5] Thus, the decision below fully accords with the settled interpretation of Section 6322.

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[5] The unlimited duration of a general tax lien is to be contrasted with other special tax liens to which Congress expressly has given limited duration. See, *e.g.*, I.R.C. § 6324(a) (estate tax lien has duration of ten years from the date of decedent's death); I.R.C. § 6324(b) (gift tax lien has duration of ten years from the date gifts are made); see also I.R.C. §§ 6324A, 6324B. Courts called upon to apply the limitation on the special estate tax lien have noted that, by contrast, the general tax lien has unlimited duration. See *United States* v. *Potemken*, 841 F.2d 97, 100 (4th Cir. 1988); *United States* v. *Cleavenger*, 325 F. Supp. 871, 876 (N.D. Ind. 1971); see also *Detroit Bank* v. *United States*, 317 U.S. 329, 335 (1943).

## CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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